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IN THE UNITED STATES COURT OF APPEALS,

For The Seventh Circuit.

Hazeltine Corporation,
Appellant,
vs.
Zenith Radio Corporation,
Appellee.

No. 15247.

MOTION UNDER RULE 15(f) TO VACATE JUDGMENT ON JURISDICTIONAL GROUNDS.

Hazeltine Corporation, by its attorneys, moves this Court for an order, pursuant to this Court's Rule 15(f), vacating the judgment entered against it by the Honorable Richard B. Austin, in an action entitled *Hazeltine Research Inc.* v. *Zenith Radio Corporation,* Civ. No. 59 C 1847. Said judgment was entered without jurisdiction over Hazeltine Corporation in violation of its rights under the Due Process clause of the Fifth Amendment to the Constitution of the United States. As grounds for its motion, movant states:

1. Hazeltine Corporation is a Delaware corporation, incorporated in 1924, with executive offices in Little Neck, Long Island, New York, and manufacturing facilities in New York and Massachusetts. It has no offices, plants, or other facilities in the Northern District of Illinois, and is not amenable to suit in said district under the antitrust laws of the United States.

2. Hazeltine Research, Inc., the plaintiff and counter-defendant in the above mentioned case, is a wholly-owned subsidiary of Hazeltine Corporation. It was organized under the laws of Illinois and capitalized by Hazeltine Corporation on March 28, 1946, and since that time has operated as an autonomous corporation with a business wholly

separate and apart from that of Hazeltine Corporation. Its principal offices are in Chicago and it is engaged in the business of research, development, ownership and licensing under United States patents, principally in the fields of radio and television.

3. The action in which judgment was entered against Hazeltine Corporation was an action for patent infringement brought by Hazeltine Research, Inc., against Zenith Radio Corporation, in which Zenith, over three years after the date of the complaint, counterclaimed against the plaintiff, Hazeltine Research, Inc., alleging misuse of patents and violations of the antitrust laws. Hazeltine Corporation was not a party to that action, did not make a general appearance, did not receive service of process, and did not participate in the trial, although some of its officers were called as witnesses. In fact, it did not participate in any way in that proceeding except to file a special appearance opposing entry of judgment against it when, long after the trial had concluded and after Zenith's findings of fact and conclusions of law were adopted by the Court, it learned for the first time that Zenith contended that the judgment should be entered against it as well as against Hazeltine Research, Inc.

4. As shown in the brief accompanying this motion, there is no basis in law or fact for the entry of any judgment assessing liability against Hazeltine Corporation in a proceeding in which it was not a party, did not participate and was not represented; and the entry of such a judgment violates fundamental legal principles and deprives Hazeltine Corporation of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

5. Hazeltine Corporation has elected to raise this substantial jurisdictional question by motion so that it can be disposed of prior to briefing, argument, and consideration

of the merits of the decision below which will necessarily involve a great number of complex factual and legal issues. The record below consists of 37 volumes of transcript numbering over 3500 pages, over 280 exhibits, and over 2,000 pages of pleadings alone. It is respectfully suggested that it would materially advance the convenience of both the Court and the parties to have this fundamental jurisdictional question resolved prior to the briefing, argument and consideration of the merits of the decision below.

6. In addition, the existence of the judgment below against Hazeltine Corporation has caused, and can be expected to continue to cause, irreparable injury to Hazeltine Corporation and its many public shareholders. The price of the common stock of the corporation traded on the New York Stock Exchange has fallen from $14\frac{1}{8}$ on January 26, 1965, the date of the publication of Zenith's contention that Hazeltine Corporation would be subject to the judgment, to $7 on July 15, 1965. The supersedeas bond agreement entered into in connection with this appeal, has not only tied up a substantial part of the corporation's liquid assets, but prohibits Hazeltine Corporation from paying dividends to its shareholders. The existence of a judgment in an amount exceeding $19,000,000 against a corporation whose consolidated book net worth is only about $21,000,000, obviously has serious adverse effects on that corporation's business and financial relationships. For example, since entry of the judgment below the Chase Manhattan Bank of New York City has withdrawn its open line of credit to Hazeltine Corporation and the corporation's Dun & Bradstreet rating has been withdrawn.

7. If, as we earnestly believe, the judgment below against Hazeltine Corporation was entered without jurisdiction over that corporation, it is respectfully submitted that the injustice done and the resulting injury should be corrected as soon as possible, and the interests of justice

would be best served by not delaying consideration of this jurisdictional issue for the time it will necessarily take to print the record and to prepare the briefs on the merits of the many complex issues involved in the decision below. It is, therefore, respectfully requested that the Court give preliminary and separate consideration to the substantial jurisdictional question raised herein.

For the reasons set forth herein, in the accompanying affidavit of Bertrand J. Tiffany, and in the supporting brief, Hazeltine Corporation respectfully requests that this Court vacate the judgment entered against it for lack of jurisdiction over Hazeltine Corporation by the trial court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—15247) * *

AFFIDAVIT OF BERTRAND J. TIFFANY.

State of New York,
County of Queens. } ss:

BERTRAND J. TIFFANY, being duly sworn, deposes and says that:

(1) He is a Vice President and the Treasurer of Hazeltine Corporation, and is licensed as a Certified Public Accountant by the State of New York.

(2) Hazeltine Corporation was incorporated in the State of Delaware in 1924. Executive offices of the corporation are maintained at Little Neck, Iong Island, New York, and manufacturing facilities are located in New York and Massachusetts. It does not do business in the State of Illinois and has no office, plant or other facility in Illinois. Hazeltine Corporation has approximately 7,000 shareholders and 2,000 employees. Its consolidated book net worth, including subsidiaries, was $21,068,763 at December 31, 1964.

(3) Hazeltine Corporation is engaged almost exclusively in the development, manufacture and sale of advanced electronic systems and equipment for military and related purposes of the United States Government, and to some extent in support of defense programs of military agencies of Allied governments. The military equipment which it develops and manufactures for the United States and its Allies is highly sophisticated equipment designed to fulfill extremely critical defense needs and must meet the most

exacting requirements. Hazeltine Corporation does not manufacture radio or television sets or any consumer products.

(4) Hazeltine Research, Inc. was organized on March 28, 1946 as an Illinois corporation. It is a wholly-owned subsidiary of Hazeltine Corporation. Some research for Hazeltine Research, Inc. is performed by Hazeltine Corporation on a contract basis, under which Hazeltine Research, Inc. compensates Hazeltine Corporation. Hazeltine Research, Inc. does not manufacture radio or television sets or any product for consumer use.

(5) On Tuesday, January 26, 1965, before the Dow Jones so-called broad tape publication of the news of the District Court's findings in Hazeltine Research, Inc. v. Zenith Radio Corporation, Civil Action No. 59-C-1847, the common stock of Hazeltine Corporation traded on the New York Stock Exchange at a high price of $14\frac{1}{4}$, and at the close of trading on June 15, 1965 the stock traded at $7 per share.

(6) On May 3, 1965, Hazeltine Corporation learned in discussion with the Chase Manhattan Bank of New York City, with which it has regularly maintained financial relations, that by reason of said District Court findings, that Bank could no longer offer to make Hazeltine Corporation unsecured loans at the prime rate, which it had for a number of years theretofore stood ready to do in amounts of at least several million dollars. On January 28, 1965, Hazeltine Corporation was advised by Dun & Bradstreet that its AAA rating was withdrawn as of that date, and thereafter it has been designated "Investigating" or unrated by that recognized national credit rating service.

(7) This affidavit is given in support of the motion of Hazeltine Corporation under Rule 15(f) of this Court; and

to the best of affiant's knowledge, information and belief, the facts set forth in the numbered paragraphs of said motion are true and correct.

/s/ Bertrand J. Tiffany
Bertrand J. Tiffany

Subscribed and sworn to before me this 20th day of July, 1965.

/s/ Olga J. Stuart
Notary Public

Notary Public, State of New York
No. 30-3884130
Qualified in Nassau County
Certificate filed in New York County
Commission expires March 30, 1967.

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—15247) * *

BRIEF IN SUPPORT OF RULE 15(f) MOTION TO VACATE JUDGMENT ON JURISDICTIONAL GROUNDS.

STATEMENT OF FACTS.

On April 5, 1965, the court below entered a judgment awarding more than $19,000,000, one of the largest antitrust awards in history, against Hazeltine Corporation in an action to which Hazeltine Corporation *was not a party*. Hazeltine Corporation, a Delaware corporation with executive offices in Little Neck, Long Island, New York, has no offices, plants or other facilities in the Northern District of Illinois, and under the venue provisions of Section 22 of Title 15 of the United States Code, is not subject to suit in the Northern District of Illinois under the antitrust laws of the United States (Tiffany Aff. ¶ 2).[1] It is engaged primarily in the business of research, development and manufacture of advanced electronic equipment for military, air traffic control and navigation, and related purposes for the United States and allied governments. It does not manufacture any consumer products (Tiffany Aff. ¶ 3).

Hazeltine Corporation's wholly-owned subsidiary, Hazeltine Research, Inc.,[2] the plaintiff and counter-defendant in the action in which the judgment here appealed was en-

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1. References to "Tiffany Aff. ¶ . . ." are to particular paragraphs in the affidavit of Bertrand J. Tiffany filed with this motion. References to "App. . ." are to pages in the attached appendix in which we have collected for convenient reference the parts of the record below which are referred to in this brief.

2. For convenience Hazeltine Research, Inc., will be referred to as HRI.

tered, is, on the other hand, an Illinois corporation with its principal offices in Chicago (App. 36). Organized and capitalized by Hazeltine Corporation on March 28, 1946, HRI has since that time operated as an autonomous corporation with a business wholly separate and apart from Hazeltine Corporation (Tiffany Aff. ¶ 4). HRI is engaged in the business of research, development, ownership, and licensing of United States patents, principally in the fields of radio and television. It does not manufacture any equipment of any kind for consumer use, but does render technical assistance and services to its radio and television licensees (Tiffany Aff. ¶ 4).

Hazeltine Corporation performs some research for HRI, for which it is reimbursed under contract (Tiffany Aff. ¶ 4). Hazeltine Corporation also owns, sells and licenses foreign patents for radio and television (App. 36-37), but it does not manufacture any radio or television equipment for domestic or foreign sale.

One might assume from the names that HRI is merely the research wing of Hazeltine Corporation. However, as the facts detailed above indicate, that is not the case. The research in the product areas within the scope of Hazeltine Corporation's manufacturing activities is conducted by Hazeltine Corporation at its own laboratories in New York and Massachusetts and not by HRI. Each corporation is a separate entity with a separate business.

A. The Action in Which the Judgment Was Entered and the Parties to It.

The court below entered the judgment appealed from on a counterclaim filed in *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, Civil Action No. 59 C 1847. The action was originally brought on November 19, 1959, by HRI for infringement of one of its United States television patents. The Sherman Act counterclaim (App. 11-16) was

filed with leave of court on May 22, 1963, more than three years after the suit was filed. The counterclaim charged HRI with conspiring with Hazeltine Corporation and other persons relative to foreign patents owned by Hazeltine Corporation and by others. Neither before nor after the filing of the counterclaim did Hazeltine Corporation participate in this litigation in any way. HRI and Zenith were the only parties for whom appearances were entered. There was never any attempt to serve Hazeltine Corporation with process, nor any motion to make it a party.

Although the counterclaim alleged that Hazeltine Corporation was the owner of foreign patents involved in the foreign conspiracy there alleged, Hazeltine Corporation's separate identity, apart and distinct from HRI, is recognized throughout the counterclaim; indeed, Hazeltine Corporation is specifically alleged to be a co-conspirator (Counterclaim, ¶¶ 3-5; see App. 12-13). The counterclaim names HRI as the sole counter-defendant and the prayer for relief asks specifically for a "judgment against counter-defendant". Elsewhere in the counterclaim where Zenith meant to describe acts of Hazeltine Corporation, Hazeltine Corporation is specifically named. The phrase, "counter-defendant and its parent, Hazeltine Corporation," frequently appears. As the counterclaim was not and could not have been directed against Hazeltine Corporation, Hazeltine Corporation did not answer it or in any way defend against it.

B. The Stipulation Upon Which the Trial Court Entered Judgment Against Hazeltine Corporation.

The trial court's decision to render judgment against Hazeltine Corporation is based on a stipulation entered into between Zenith and HRI on May 15, 1963, during the pretrial discovery phase of the litigation, "in order", as its preamble recites, "to simplify and expedite trial" and

"for purposes of this action only" (App. 6-9). The several paragraphs of the stipulation all relate to procedural matters. The pertinent paragraph, together with the preamble setting forth the stipulation's purpose, is as follows (emphasis added):

> "*The parties to this Action, by their attorneys,* in fulfillment of certain understandings reached orally in the course of the pre-trial conference held herein on April 3, 1963, *in order to simplify and expedite trial* hereby stipulate and agree, *for purposes of this Action only,* as follows:
>
> * * *
>
> * * * * *
>
> "4. *Plaintiff agrees* that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company" (App. 6-7).

The remaining paragraphs of the stipulation may be summarized as follows:

Paragraphs 1 through 3: These three paragraphs constitute an agreement that neither party to the stipulation would bring any action to determine the validity of any of plaintiff's patents, other than the patent involved in this suit, until after final disposition of this action, and that the defendant would treat the statute of limitations as having been tolled in any patent infringement suit later brought.

Paragraph 5: The authenticity of specified documentary evidence was agreed to for purposes of admissibility in evidence at the trial.

Paragraphs 6 and 7: The parties agreed that copies of documentary exhibits and uncertified copies of patents and printed publications could be received in evidence at the trial.

Paragraph 8: "Plaintiff is and has been since its date of issue the owner of Letters Patent No. 2,547,648, granted to A. V. Loughren on April 3, 1951, involved in this Action."

Paragraph 9: "Solely for the purposes of establishing venue in this Action," Zenith admitted certain facts establishing venue in the Northern District of Illinois.

Paragraph 10: Agreement as to taxing cost of transcript.

Paragraph 11: It was provided that the stipulation could be offered in evidence "by either party" (App. 8-9).

The stipulation was signed by counsel for Zenith and by "L. B. Dodds, Counsel for Plaintiff", *i.e.*, HRI. The stipulation shows on its face these facts: (1) Hazeltine Corporation was not a party to the stipulation, (2) the stipulation did not purport to bind Hazeltine Corporation, and (3) that the stipulation's purposes were purely procedural and limited to issues in a case in which Hazeltine Corporation was not a party. Although Mr. Dodds, who was plaintiff's trial counsel, was also a vice president of Hazeltine Corporation, he did not purport to execute the stipulation on behalf of Hazeltine Corporation and the record shows that he had relinquished all administrative responsiiblities in Hazeltine Corporation's organization in 1960, several years before the stipulation was signed (App. 35-36, 38-39).

C. Circumstances Surrounding the Execution of the Stipulation Between HRI and Zenith.

The intent of counsel for both HRI and Zenith with respect to this paragraph of the stipulation is also clear from the circumstances surrounding the entry of the stipulation.

The answer to the original complaint raised (in its paragraph 13; App. 4-5(a misuse defense allegedly based on an antitrust violation involving foreign patents. The trial judge upheld a subpoena served upon HRI which sought certain documents relating to Hazeltine Corporation's foreign patents. No immediate attempt was made to enforce this subpoena.

A pretrial conference was held on April 3, 1963, at which, among other things, the matter of compliance with the subpoena was raised. At that time, counsel for HRI, endeavoring to cooperate to facilitate pretrial discovery, indicated to the court that in order to simplify and expedite the trial *plaintiff* (HRI) would not rely on the fact that it is a corporate entity separate and distinct from Hazeltine Corporation (App. 27-28).

The disputed paragraph of the stipulation was in fact *drafted by counsel for Zenith,* and sent to counsel for HRI by letter of April 26, 1963, as a part of a longer suggested form of stipulation. Counsel for HRI made certain changes and additions to the stipulation, but did not change the paragraph in issue (App. 28, 31-33).

On March 26, 1963, Zenith had served but did not file with the court or clerk a motion for leave to file its antitrust counterclaim against HRI which alleged a conspiracy between HRI and other parties including Hazeltine Corporation relating to foreign patents (App. 23-24). This counterclaim did not name Hazeltine Corporation as a party and did not ask for relief against it. Since the stipulation did not exist on March 26th, it is clear that in the drafting and serving of the proposed counterclaim Zenith did not intend to make Hazeltine Corporation a party or to seek recovery from it.

The stipulation was executed by counsel for HRI on May 7, 1963. Counsel for Zenith executed the stipulation on May 15, 1963. Thereafter, on May 22, 1963, Zenith filed its antitrust counterclaim against HRI, not Hazeltine Corporation (App. 10, 28-29). Indeed, as pointed out above, the counterclaim not only failed to name Hazeltine Corporation as a party but treated it throughout as a non-party.

At no time in the pretrial proceedings that followed the filing of the counterclaim, in the trial itself, or in the post-trial papers submitted before the proposed judgment, did

counsel for Zenith indicate any intention to construe this stipulation as making Hazeltine Corporation a party. Nor did counsel for HRI do or say anything that would indicate an understanding or intention that the stipulation made Hazeltine Corporation a party. And, as has already been pointed out, no attempt was ever made to name Hazeltine Corporation as a party to the action.

D. The Judgment.

On January 25, 1965, the trial judge adopted *verbatim and without opinion* the findings of fact and conclusions of law that had been proposed to him by Zenith on all issues including the issues of antitrust law violations and damages (App. 21). The findings also indicated the amount of the damage award that would be part of the judgment he proposed to enter—$16,238,872, trebled (Finding 36; App. 19-20). The findings did not, however, suggest that the judgment would run against Hazeltine Corporation, although reference was made to the stipulation.[3]

Responsible officials of Hazeltine Corporation first learned that the judgment to be entered might run against Hazeltine Corporation as well as its subsidiary when on the day following the entry of the findings they were informed that Zenith's counsel had told Dow Jones & Company, Inc., that the judgment was expected to bind Hazeltine Corporation (App. 29-30).

Zenith's proposed form of judgment filed March 19, 1965, was the first paper filed in the District Court suggesting

3. The finding distorts the actual terms of the stipulation, saying:

> "The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries" (App. 19).

that the judgment should run against Hazeltine Corporation as well as HRI (App. 22). Thereafter the date for entering the judgment was postponed and pursuant to motions filed by HRI some of the damage findings were withdrawn and a further hearing was ordered on certain issues (App. 25). These issues are still pending in the district court. At the trial judge's request on April 1, 1965, Zenith served a new form of proposed final judgment, changed in respect to the amount of damages, but still drafted as running against Hazeltine Corporation. Following oral argument on the form of the judgment, on April 5, 1965, when counsel appeared specially on behalf of Hazeltine Corporation to protest the entry of judgment against it, the trial judge entered the judgment just as it was proposed by Zenith (App. 1-3).

E. The Petitions for Mandamus and Supersedeas Bond.

On the day the judgment was entered, Hazeltine Corporation filed a petition for mandamus asking this Court to issue a writ of mandamus or prohibition on the basis that the district court was without power to enter judgment against Hazeltine Corporation. The petition was denied on April 7, 1965.

Thereafter Hazeltine Corporation sought a stay of the judgment pending appeal, again by special appearance below. The trust agreement approved by the trial court provides that Hazeltine Corporation will not be held on the supersedeas bond if the judgment as to it is reversed, vacated or otherwise nullified.

Summary of Argument.

I. The trial court had no jurisdiction to enter judgment against Hazeltine Corporation, which was not a party to the case, and could not have been sued in the Northern District of Illinois. The entry of judgment against one who is not a party to a suit is a violation of fundamental legal principles and deprives Hazeltine Corporation of its property without due process of law. Moreover, it is well settled that even if Hazeltine Corporation had conducted, controlled, and directed the defense of the case to such an extent that the judgment would be *res judicata* against Hazeltine Corporation *as to the issues involved*—which it did not—the District Court had no power to enter *judgment* against it in this case.

II. There is nothing in the pre-trial procedural stipulation entered into by HRI and Zenith which makes Hazeltine Corporation a party to this suit or subject to the jurisdiction of the trial court. Hazeltine Corporation was not a party to the stipulation, and the clear and explicit language of the stipulation refutes any contention that the stipulation was intended to make Hazeltine Corporation a party to the suit. Nothing that the parties did at the time of the execution of the stipulation or later would support a contention that the stipulation was intended either to bind Hazeltine Corporation or to make it a party to the suit. The counterclaim which was filed after the stipulation, and the briefs, arguments, and conduct of trial, all are consistent only with the fact that Hazeltine Corporation was not a party. Under such circumstances, the court lacked jurisdiction to enter a judgment against Hazeltine Corporation.

Contested Issues.

The contested issues in connection with this motion are:

(1) Can a trial court enter judgment against a corporation which is not named as a party, has never been served with process, did not enter a general appearance, and is not amenable to suit in its district, simply because that corporation's subsidiary is a party to the suit?

(2) Can a stipulation, which was procedural in nature, entered into by the parties to the suit, be the basis for entering a judgment *in personam* against Hazeltine Corporation, which was not a party either to the suit or the stipulation?

Propositions of Law Relied Upon.

I. The Trial Court Had No Power to Enter the Judgment Against Hazeltine Corporation, a Non-Party.

1. An exercise of jurisdiction over a person not before the court is a nullity.

Hanson v. *Denckla,* 357 U. S. 235, 249-50 (1958).
Estin v. *Estin,* 334 U. S. 541, 548-49 (1948).
D'Arcy v. *Ketchum,* 52 U. S. (11 How.) 165, 174 (1850).
Hollingsworth v. *Barbour,* 29 U. S. (4 Peters) 466 (1830).

2. Such an exercise of jurisdiction resulting in a judgment in personam over a person who has not been made a party by service of process is not that due process of law required by the Fifth Amendment.

Hansberry v. *Lee,* 311 U. S. 32, 40-41 (1940).
Pennoyer v. *Neff,* 95 U. S. 714 (1878).
Vanderbilt v. *Vanderbilt,* 354 U. S. 416, 418-19 (1957).
Riley v. *New York Trust Co.,* 315 U. S. 343, 353-54 (1942).

3. A judgment is not authorized even against one who conducts, controls and directs the defense to such an extent that a judgment would be res judicata against him.

Schnell v. *Peter Eckrich & Sons, Inc.* 365 U. S. 260 (1961).

Merriam Co. v. *Saalfield,* 241 U. S. 22 (1916).

Schnell v. *Peter Eckrich & Sons, Inc.,* 279 F. 2d 594 (7th Cir. 1960), aff'd, 365 U. S. 260 (1961).

Freeman-Sweet Co. v. *Luminous Unit Co.,* 264 Fed. 107 (7th Cir. 1919).

II. The Stipulation Between Zenith and HRI did not make Hazeltine Corporation a Party to this Action or give the Trial Court Jurisdiction to enter Judgment Against Hazeltine Corporation.

1. Persons not parties to a stipulation are not bound by the stipulation.

Kneeland v. *Luce,* 141 U. S. 437, 440-41 (1891).

Thibodo v. *United States,* 134 F. Supp. 88, 98 (S. D. Cal. 1955).

Strand v. *Garden Valley Tel. Co.,* 51 F. Supp. 898, 905 (D. Minn. 1943).

83 C. J. S. Stipulations § 14.

50 Am. Jur. Stipulations § 10.

2. Any doubts or ambiguities in a written document are resolved against the drafting party.

Alcoa S. S. Co. v. *United States,* 338 U. S. 421, 424-25 (1949).

Caterpillar Tractor Co. v. *Collins Mach. Co.,* 286 F. 2d 446, 450 (9th Cir. 1960).

3. A subsidiary is not the agent of its parent merely by virtue of being a wholly-owned subsidiary.

Press Co. v. *NLRB*, 118 F. 2d 937, 946-47 (D. C. Cir. 1941), *cert. denied*, 313 U. S. 595 (1941).
RCA v. *Rauland Corp.*, 16 F. R. D. 160, 163 (N. D. Ill. 1954).

4. A parent corporation is not subject to suit in a jurisdiction merely because its subsidiary can be sued there.

Cannon Mfg. Co. v. *Cudahy Pkg. Co.*, 267 U. S. 333, 336 (1925).
Fisher Baking Co. v. *Continental Baking Corp.*, 238 F. Supp. 322, 328 (D. Utah 1965).

ARGUMENT.

I. The Trial Court Had No Power to Enter Judgment Against Hazeltine Corporation, a Non-Party.

Prior to entry of the judgment, there was never any attempt in this proceeding to designate Hazeltine Corporation as a party nor to serve it with process.[4] By its entry of judgment against Hazeltine Corporation as well as against Hazeltine Research, Inc., the trial court has attempted to bind a non-party to a judgment *in personam*. Such a holding is a denial of procedural due process. *Riley* v. *New York Trust Co.*, 315 U. S. 343, 353-54 (1942). A court may not exercise an *in personam* jurisdiction over a person not before the court. *Estin* v. *Estin*, 334 U. S. 541, 548-49 (1948).

Long before the Supreme Court decided the "landmark

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4. Subsequent to entry of the judgment, Zenith *for the first time* designated Hazeltine Corporation as a party in the caption of the case in the statement which it filed in the District Court, pursuant to Rule 12(d) of this Court (App. 34).

case"[5] of *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), it was recognized that "an exercise of jurisdiction over persons or property outside the forum State was . . . an absolute nullity . . . [and] any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void . . . ." *Hanson* v. *Denckla*, 357 U. S. 235, 249-50 (1958). The early common law principle that no court had the power to render a judgment or decree against one not served with process to appear and defend, *Hollingsworth* v. *Barbour*, 29 U. S. (4 Peters) 466 (1830); *D'Arcy* v. *Ketchum*, 52 U. S. (11 How.) 165, 174 (1850); was held in *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878), to be embraced in the constitutional guaranty of "due process of law." By 1957, the Supreme Court could say:

> "It has *long* been *the constitutional rule* that a court cannot adjudicate a personal claim or obligation *unless* it has *jurisdiction over the person* of the defendant." *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418 (1957) (Emphasis added).

The rule's development from common law principle to requirement of due process was summarized by the Supreme Court in *Hansberry* v. *Lee*, 311 U. S. 32 at 40-41 (1940):

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe . . .; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require."

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5. Mr. Justice Black, dissenting in *Hanson* v. *Denckla*, 357 U.S. 235 at 260 (1958).

Since Hazeltine Corporation was never a party to the action in which this judgment was entered, the judgment against it is void.

This requirement is recognized in the wording of Rule 19 of the Federal Rules of Civil Procedure. After detailing the methods by which persons can be made parties, the rule provides expressly, "the judgment rendered therein does not affect the rights or liabilities of absent persons." Fed. R. Civ. P. 19 (b).

Moreover, even assuming contrary to fact that Hazeltine Corporation had participated in the defense of the case to such an extent that the judgment would have been *res judicata* as to it, the district court had no power to enter a judgment against it. *Merriam Co.* v. *Saalfield,* 241 U. S. 22 (1916); *Schnell* v. *Peter Eckrich & Sons, Inc.,* 279 F. 2d 594 (7th Cir. 1960), *aff'd,* 365 U. S. 260 (1961).

In the leading case of *Merriam Co.* v. *Saalfield,* 241 U. S. 22 (1916), the Supreme Court established the principle that a court has no power to enter a judgment *in personam* against a non-party who has not been properly served with process even though it is unquestioned that the non-party "conducted, controlled, and directed the defense of the suit" (241 U. S. at 24). The Court made it clear that this rule had been universally applied by the judiciary:

> "No case to which we are referred, nor any other that we have found, goes to the extent of sustaining . . . a decree *in personam* against a party upon the ground that he had participated in the defense . . . so as to become bound upon the doctrine of *res judicata*" (241 U. S. at 31).

Almost half a century later this same question was presented to this Court in *Schnell* v. *Peter Eckrich & Sons, Inc.,* 279 F. 2d 594 (7th Cir. 1960), *aff'd,* 365 U. S. 260 (1961):

"The sole contested issue is whether as a matter

> of law Allbright-Nell, *a named defendant,* by its open assumption and control of the defense of Eckrich submitted to the jurisdiction of the District Court'' (279 F. 2d 594; emphasis added).

Relying upon its early holding in *Freeman-Sweet Co. v. Luminous Unit Co.*, 264 Fed. 107 (7th Cir. 1919), this Court held a non-party could not, over its objection, be made a party defendant in a jurisdiction of which it was not an inhabitant, solely upon the basis that it controlled the defense. Reaffirming its holding in the *Merriam* case that participation in the defense does not amount to a general appearance, the Supreme Court affirmed this Court's decision in *Schnell,* 365 U. S. 260, 263 (1961). The Court laid down the following principle:

> ''The conduct which will amount to a waiver of venue is that of the defendant alone and nothing a plaintiff might do can change the legal consequences which attach to that conduct'' (365 U. S. at 264).

Clearly under Section 12 of the Clayton Act (15 U. S. C. A. § 22)[6] Hazeltine Corporation is not subject to suit under the antitrust laws in the Northern District of Illinois since it is neither an inhabitant nor is it found therein nor does it transact business there. Moreover, as Hazeltine Corporation did not participate in the proceedings below except to appear specially to contest jurisdiction, there has been no act which could constitute waiver.

In both the *Merriam* case and the *Schnell* case, the plaintiff had a stronger claim to judgment than Zenith has because in each case the plaintiff attempted to join the appellant *as a party.* Here Zenith never sought to name Hazeltine Corporation as a party until after the findings

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6. Section 12 provides in pertinent part:

> ''Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . .''

of fact had been adopted by the trial court; and there is no suggestion in the findings that Hazeltine Corporation was to be treated as a party. As has been pointed out, Zenith's proposed form of *judgment* is the first formal paper filed in this litigation which treats Hazeltine Corporation as a party.

Sinec there is no evidence that Hazeltine Corporation participated in any way in the trial of this case[7] and no attempt was made to bring it in as a party, the trial court had no power to enter a judgment against it. Indeed, the express holdings of this Court and of the Supreme Court prevent such a judgment.

Moreover, there is nothing in the record to indicate that Hazeltine Corporation controlled the defense to the counter-claim. Under these circumstances, a judgment against its subsidiary would not have bound Hazeltine Corporation under recognized principles of *res judicata.*

If Zenith wishes to make a claim against Hazeltine Corporation, and to assert *res judicata* as a part of that claim, it may attempt to do so by bringing a separate action against Hazeltine Corporation in a court having jurisdiction over it. In such proceeding any claim of *res judicata* could be litigated, together with the other issues involved in such claim. See, *e.g., Bros, Inc.* v. *W. E. Grace Mfg. Co.,* 261 F. 2d 428 (5th Cir. 1958). But there is no basis upon which Zenith may pursue Hazeltine Corporation in the cause now before this Court. *Merriam Co.* v. *Saalfield,* 241 U. S. 22 (1916); *Schnell* v. *Peter Eckrich & Sons, Inc.,* 279 F. 2d 594 (7th Cir. 1960), *aff'd,* 365 U. S. 260 (1961).

In summary, the legal principles violated by the judgment below are so fundamental that to permit it to stand would deprive Hazeltine Corporation of its property, indeed, its

7. Some officers of Hazeltine Corporation appeared as witnesses in the trial of the case but this does not make it a party. *Thaxton* v. *Vaughan,* 321 F.2d 474, 479 (4th Cir. 1963).

very corporate life, without due process of law. The most basic procedural principles foreclose the possibility of such a result.

II. The Stipulation Between Zenith and HRI Did Not Make Hazeltine Corporation a Party to This Action or Give the Trial Court Jurisdiction to Enter Judgment Against Hazeltine Corporation.

The only rationalization for the entry of this judgment against Hazeltine Corporation that has ever been suggested by counsel for Zenith, who proposed it, or by the trial judge, who adopted counsel's proposal verbatim without any independent explanation, is the pretrial stipulation (App. 19, 40-41). As we shall show, however, the stipulation did not make Hazeltine Corporation a party to the suit or give the trial court jurisdiction to enter judgment against Hazeltine Corporation.

A. Hazeltine Corporation Is Not a Party to the Stipulation and by Its Clear Terms the Stipulation Was Not Intended to Bind Hazeltine Corporation to Anything.

Although stipulations are not true contracts, it is settled that the general principles of construction applicable to contracts are also applicable to stipulations. 83 C. J. S. *Stipulations* § 11, at 26. Accordingly, "the primary rule in the construction of stipulations is that the court must, if possible, ascertain and give effect to the intent of the parties." *Id.* at 26-27.

As would be true in construing a contract, the intent of the parties is ascertained, first, from the plain meaning of the language used in the instrument. And the plain meaning of the language here is that the parties to the stipulation did not expect or intend that it bind Hazeltine Corporation in any way.

Moreover, Hazeltine Corporation could not be bound by the stipulation even if the parties to the stipulation so intended, because it is not a party to the stipulation. Contracts do not bind those who are not parties to them: "The general rule is well settled . . . that parties cannot by stipulation affect any rights but their own, and that persons not parties to the stipulation are not bound thereby." 83 C. J. S. *Stipulations* § 14, at 35. Accord, 50 Am. Jur. *Stipulations* § 10; *Kneeland* v. *Luce,* 141 U. S. 437, 440-41 (1891); *Thibodo* v. *United States,* 134 F. Supp. 88, 98 (S. D. Cal. 1955); *Strand* v. *Garden Valley Tel. Co.,* 51 F. Supp. 898, 905 (D. Min. 1943).

The stipulation shows on its face that Hazeltine Corporation is not a party to it and that it was not intended to bind Hazeltine Corporation in any way. It begins with this unequivocal statement, "the parties to this Action, by their attorneys . . . hereby stipulate and agree. . . ." The disputed paragraph of the stipulation, paragraph 4, states that "*Plaintiff* agrees . . ." to what is set forth in the paragraph, and in that paragraph a clear distinction is made between "Plaintiff and its parent Hazeltine Corporation. . . ." The stipulation was executed by counsel for Zenith and by "L. B. Dodds" who is specifically identified as "Counsel for Plaintiff" (App. 6-7, 9).

If at the time this stipulation was entered into counsel for Zenith had had any idea that Hazeltine Corporation was a party to it, surely in the light of the governing law counsel would have objected to the language which was used, language which clearly limited the effect of the stipulation to the parties then named in the litigation as parties and carefully delineated Mr. Dodds' authority as that of counsel for plaintiff. Not only did counsel for Zenith not object to this language, but all of the language quoted, which limits the stipulation clearly to the parties to the litigation, was in fact drafted by them. It is impos-

sible that counsel for Zenith could have been misled, or persuaded to sign something different from the oral agreement which the writing was supposed to record, by language that they *themselves* supplied. *Indeed,* under the fundamental principles of contract law applicable here, any doubts and ambiguities must be resolved against the party who drafted it, that is, against Zenith. See *Alcoa S. S. Co.* v. *United States,* 338 U. S. 421, 424-25 (1949); *Caterpillar Tractor Co.* v. *Collins Mach. Co.,* 286 F. 2d 446, 450 (9th Cir. 1960); 17 Am. Jur. 2d, *Contracts* § 276.

Nor can it be said that Hazeltine Corporation became a party to the stipulation by reason of any alleged agency of HRI or of HRI's attorney, Mr. Dodds. That the assumption of an agency relationship between Hazeltine Corporation and HRI may have played a part in the trial court's original decision is indicated in one of the remarks of the trial judge in the course of the argument on Zenith's proposed judgment when he asked specifically whether it was the position of Hazeltine Corporation that the child could not bind the parent (App. 42-43). It *is* Hazeltine Corporation's firm position that the child could not and did not bind the parent by this stipulation.

First, it is settled that a subsidiary cannot bind its parent simply by virtue of being a subsidiary. Fundamental corporation law is directly contrary. A wholly-owned subsidiary is not necessarily the agent of its parent. *Press Co.* v. *NLRB,* 118 F. 2d 937, 946-47 (D. C. Cir. 1941), *cert. denied,* 313 U. S. 595 (1941). See also, *RCA* v. *Rauland Corp.,* 16 F. R. D. 160, 163 (N. D. Ill. 1954), where Zenith successfully interposed its separateness from *its* wholly-owned subsidiary and the court said:

> ". . . mere ownership by Zenith of Rauland's stock does not serve to destroy the separate corporate existence of Rauland and of its right to a day in Court."

If an agency relationship exists, it must have been created in the same way that such relationships are created between other otherwise independent persons (Restatement of the Law of Agency § 14M) and there is nothing in the record here which shows any such relationship was created.

The real question here is exactly the question the Supreme Court long ago posed in *Cannon Mfg. Co.* v. *Cudahy Pkg. Co.*, 267 U. S. 333, 336 (1925): "whether the corporate separation carefully maintained [for other legal purposes] must be ignored in determining the existence of jurisdiction." The Supreme Court's answer was that:

> "Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein." (*Ibid.*)

As recently as 1965, Judge Christensen pointed out that although the *Cudahy* case is 45 years old, its controlling effect remains. *Fisher Baking Co.* v. *Continental Baking Corp.*, 238 F. Supp. 322, 328 (D. Utah 1965).

Similarly, there could be no merit in a contention that Hazeltine Corporation became a party to the stipulation by reason of the fact that Mr. Dodds, who acted as HRI's attorney and signed the stipulation expressly as attorney for HRI, was also a vice-president of Hazeltine Corporation. Purely aside from the fact that Mr. Dodds had no administrative responsibilities with Hazeltine Corporation (App. 35-36, 38-39), it is obvious that his signing as attorney for HRI could not bind Hazeltine Corporation. The signing of an agreement by Mr. Dodds expressly as attorney for Hazeltine Research, Inc., does not make Hazeltine Corporation bound to or by the agreement merely because Mr. Dodds also happened to be an officer of Hazeltine Corporation. Counsel for Zenith did not cite to the trial court any

authority for such a novel proposition, nor are we familiar with any.

If counsel for Zenith believed at the time this stipulation was executed that Mr. Dodds was acting not only for the subsidiary but also for Hazeltine Corporation, and, moreover, as its agent, certainly counsel would have insisted that the stipulation recite that authority. At the very least, Zenith's counsel would surely have made strenuous objection to a recital in the stipulation itself which specifically limited Mr. Dodds to his authority as "counsel for plaintiff". But, again, Zenith not only made no objection to the stipulation's clear identification of Mr. Dodds as "counsel for plaintiff" but in fact had proposed language having the same meaning and effect. Obviously, therefore, the plain meaning of the language used reflects the actual understanding of both parties at the time the stipulation was executed, *i.e.*, that Mr. Dodds did not sign for Hazeltine Corporation and did not represent that he was signing for Hazeltine Corporation.

B. Neither the Circumstances Surrounding the Execution of the Stipulation Nor the Events Which Followed Indicate That Either Party Assumed or Intended That the Stipulation Made Hazeltine Corporation a Party to the Suit.

The circumstances which let to the execution of the stipulation are wholly inconsistent with any contention that Hazeltine Corporation was made a party to the suit by it. The purpose of the stipulation is clearly stated: "to simplify and expedite trial . . ." (App. 6). The particular paragraph of the stipulation in dispute here is twice qualified as procedural and limited—in the preamble as being made "for purposes of this Action only . . ." and in the paragraph itself as "for purposes of this litigation . . ." (App. 6-7).

The procedural advantages to Zenith of the stipulation interpreted as written are obvious. It eliminated for Zenith the necessity of proving its allegation that Hazeltine Corporation and HRI were co-conspirators and that HRI, the party to the suit, was in some way liable for acts at least in part performed by its parent, Hazeltine Corporation.

There were also procedural advantages to HRI. To defend the charge that HRI conspired with Hazeltine Corporation would have been most costly and time consuming. Counsel for HRI concluded that the counterclaim was so lacking in merit that it would save his client both trouble and expense and shorten the trial considerably if he agreed that *his client,* HRI, for the purpose of this case, assumed liability for the acts of its parent, Hazeltine Corporation. But he did not and could not agree to the reverse, *i.e.,* that Hazeltine Corporation would be liable for the acts of HRI or on any judgment rendered against HRI.

Thus it is clear that the stipulation, interpreted consistently with the plain meaning of its language, did have a procedural advantage for the actual parties to the suit at the time it was agreed upon by them.

On the other hand, Hazeltine Corporation had nothing to gain by this stipulation. It could not be sued in the Northern District of Illinois under the antitrust laws and it could gain nothing by agreeing to submit itself to the jurisdiction of that Court. Under such circumstances a finding that Hazeltine Corporation voluntarily submitted itself to jurisdiction and made itself a party to the suit by agreement, would require clear and unequivocal language in an agreement *actually entered into by Hazeltine Corporation.* But no such language is present here; indeed, it is clearly to the contrary.

The events following the execution of the stipulation similarly indicate that the parties assumed that Hazeltine

Corporation was *not* a party. A week after the stipulation was executed, Zenith, with leave of court, filed a counterclaim that clearly and repeatedly recognized Hazeltine Corporation as an entity separate from the counterdefendant HRI and as a non-party.

The counterclaim (App. 11-16) was captioned:

> Hazeltine Research, Inc.,
> *Plaintiff-Counterdefendant,*
> *vs.*
> Zenith Radio Corporation,
> *Defendant-Counterclaimant.*
>
> Civil Action
> No. 59 C 1847.

The caption did not name Hazeltine Corporation either as a counterdefendant or as a third party defendant. In that portion of the counterclaim entitled "The Parties", paragraph 3 alleged:

> "3. *Counterdefendant, Hazeltine Research, Inc., the party plaintiff in this suit,* is an Illinois corporation owned and operated as a wholly-owned subsidiary of Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices. Counterdefendant's *sole business is research in the radio and TV fields and the licensing of a patent pool in the United States pertaining to radio and television receivers and other electronic products,* said pool being the United States counterpart of a number of inter-related territorial patent pools formed and operated in various market areas of the world, pursuant to a combination and conspiracy *between counterclaimant, its parent, Hazeltine Corporation,* and sundry other persons and corporations, domestic and foreign, as more particularly described and set forth hereinafter" (Emphasis added).

Paragraph 4 of the counterclaim alleged:

> "4. Counterclaimant realleges Paragraphs 12 and 13 of its Answer herein and further asserts that *coun-*

> *terdefendant and its parent, Hazeltine Corporation,* in furtherance of the conspiracy alleged herein has entered into illegal agreements and arrangements with large foreign companies. . . . Counterdefendant *and its parent, Hazeltine Corporation,* have thereby agreed with their foreign co-conspirators not to grant licenses under their patents and inventions that would permit exports from the United States into England, Canada, Australia. . . . The domestic patent rights of the foreign co-conspirators are, by agreement between *Hazeltine Research, Inc., Hazeltine Corporation* and said co-conspirators, funneled into the Hazeltine domestic pool by assignment to counterdefendant, Hazeltine Research, Inc." (Emphasis added.)

On the basis of this alleged activity, in which the separateness of the two corporations both at law and in this litigation are clearly preserved, the prayer for relief asked for money damages only against *Hazeltine Research, Inc.* The Zenith prayer for relief sought (emphasis added):

> "1. A judgment *against counterdefendant* for treble the amount of damages sustained by defendant *as the* proximate *result of* said acts of *counterdefendant and its co-conspirators* and for costs and attorney's fees.
> "2. An injunction *enjoining counterdefendant and anyone in privity with it* from bringing or prosecuting this or any other actions at law or suit in equity charging infringement of any patents against counterclaimant, its agents, vendees, distributors or others in privity with counterclaimant and enjoining counterdefendant from continuing its said unlawful combination and conspiracy.
> "3. Such other and further relief as the Court may deem just."

Nowhere in this counterclaim is there the slightest suggestion that recovery is sought against Hazeltine Corporation.

Tantamount to a clear admission that counsel for Zenith did not regard Hazeltine Corporation as a party after

execution of the stipulation is the fact that Zenith included Hazeltine Corporation as a party in the caption of the case *for the first time* in its Statement required by Rule 12 (d) of this Court filed in the District Court on or about May 18, 1965 (App. 34). From the date of the execution of the stipulation on May 15, 1963, until after January 25, 1965, the date the trial court adopted Zenith's proposed findings of fact, neither Zenith's counsel nor the court below referred to or denominated Hazeltine Corporation as a party.

On the contrary, Zenith's pre-trial and post-trial briefs on the antitrust issues, both filed after the stipulation, implicitly recognize the distinction between the plaintiff, HRI, a party, and Hazeltine Corporation, a non-party. Zenith's counsel there explained that "*Plaintiff is* a patent holding and licensing company *wholly owned by* a large New York Electronics company called *Hazeltine Corporation*". Pre-Trial and Post-Trial Briefs on Misuse and Antitrust Issues (App. 17, 18; emphasis added).

The only appearance of Hazeltine Corporation was the special appearance to question the jurisdiction of the trial court to enter judgment against Hazeltine Corporation (App. 26). It was filed as soon as Hazeltine Corporation had been put on notice that it stood in danger of such a judgment and the trial court recognized that it had a right to file such appearance contesting jurisdiction (App. 44-45). On such a record, we believe there is no basis to hold that the stipulation made Hazeltine Corporation a party.

Conclusion.

For the reasons stated, Hazeltine Corporation respectfully requests that the judgment below be vacated as to it on the ground that the trial court did not have jurisdiction to enter a judgment against Hazeltine Corporation.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS.

(Caption—15247)

ANSWER OF ZENITH RADIO CORPORATION TO HAZELTINE CORPORATION'S MOTION TO VACATE JUDGMENT.

Zenith Radio Corporation, by its attorneys, by way of answer to the motion of Hazeltine Corporation to vacate the judgment as to it, on the ground that the court below did not have jurisdiction of its person, says:

1. The Hazeltine Corporation motion, filed by a different set of attorneys from those who tried the case in the court below, attempts to reverse a $19,042,173 judgment by what amounts to a motion of course. Such procedure is contrary to this court's Rule 16(b) which contemplates that all parts of the record necessary "fairly to present the issues on appeal" shall be included in the printed appendix and which further provides "If appellant . . . raises a question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment, he shall include in the appendix all evidence pertinent thereto." The procedure is also contrary to FRCP Rule 52(a) which provides that "findings of fact shall not be set aside unless clearly erroneous."

2. The motion purports to be filed under provision of this court's Rule 15(f). No authority is cited by Hazeltine Corporation for reviewing under this rule a finding of a lower court on its ruling that it had jurisdiction over the person of a party; nor can we find any. It is submitted that the apparent purpose of the Rule is to provide a summary procedure for attacking the jurisdiction of *this* court where, for example, the notice of appeal is not timely filed or where the judgment or order appealed from is not

a final order. The jurisdictional question presented by Hazeltine Corporation, however, is whether the *trial* court had jurisdiction of its person. The trial court decided this question against Hazeltine Corporation after it was raised by motion, briefed and argued. Only then did the trial court enter judgment against Hazeltine Corporation. This judgment has been appealed by Hazeltine Corporation and there is no question of this court's jurisdiction to hear this appeal.

3. In any event, in the circumstances of this case, it is apparent that the question of whether the trial court had personal jurisdiction of Hazeltine Corporation cannot properly be determined on less than the entire record, after hearing on the merits. To summarily vacate the judgments below would deprive Zenith Radio Corporation of its rights on appeal.

4. The trial court entered a finding that for the purposes of this litigation Hazeltine Corporation and Hazeltine Research, Inc., its wholly-owned subsidiary, would be considered one and the same. This finding (No. 3) reads as follows:

> "Counterdefendant, Hazeltine Research, Inc., the party plaintiff in this suit, is an Illinois corporation owned and operated as a wholly owned subsidiary of Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices. The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries. The gross income of the Hazeltine enterprises approximates $47,000,000 a year."

No exception or objection was taken to the entry of this finding by Hazeltine Corporation or Hazeltine Research, Inc.; nor did either company assert in its post-trial brief, as claimed here, that the stipulation was merely procedural.

5. Not only did the trial court enter the above finding but it denied Hazeltine Corporation's post-trial motion opposing entry of judgment against it on the grounds that the court lacked *in personam* jurisdiction. The Hazeltine Corporation appeal and present motion necessarily raises the question of the sufficiency of the evidence to support this ruling, and, therefore, the motion should be denied for failure to present the record as an appendix as required by the rules of this court.

6. Contrary to the assertions in the Hazeltine Corporation motion and brief, Hazeltine Corporation was a party to the litigation by (1) voluntarily submitting itself to the jurisdiction of the court by stipulating that it was to be considered as one entity with Hazeltine Research, Inc.; (2) invoking the jurisdiction of the court by seeking affirmative relief and the entry of findings in its favor (see Exhibit A attached to the Thomas C. McConnell Affidavit); (3) controlling the conduct of the litigation as the real party in interest; and (4) engaging in actions constituting a general appearance. Only after losing the case did Hazeltine Corporation employ its present counsel and seek to repudiate its agreement and consent to the court's jurisdiction of its person and the actions of its trial counsel constituting a general appearance. The appendix filed by Hazeltine Corporation with its motion and brief, except for the stipulation, contains none of the relevant portions of the record showing Hazeltine Corporation's agreement and consent by conduct to be bound by the judgment entered in the court below. Although the Hazeltine Corporation brief states that its construction of the stipulation is supported by the record (pages 7 and 10 of

the Hazeltine brief) and further that the record consists of "37 volumes of transcript numbering over 3,500 pages and over 280 exhibits" only five pages of the trial transcript are reproduced in its appendix.

7. No sufficient reason is given by Hazeltine Corporation for departing in this case from the usual and orderly procedure in hearing appeals. The size of the judgment entered against it is the direct result of Hazeltine Corporation's flagrant violation of the antitrust laws. That this judgment has depressed the price of Hazeltine Corporation's stock is obviously immaterial and clearly does not constitute grounds for dealing summarily with Zenith's rights on this appeal.

For the reasons set forth herein and the supporting brief and affidavit of Thomas C. McConnell, it is respectfully submitted that the motion of Hazeltine Corporation should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS.

* * * (Caption—15247) * *

AFFIDAVIT OF THOMAS C. McCONNELL.

State of Illinois, }
County of Cook. } ss.

Thomas C. McConnell, being first duly sworn, on oath deposes and says:

1. Affiant was chief trial counsel for the Appellee, Zenith Radio Corporation, in the Court below and personally conducted the trial of the Zenith counterclaim and antitrust claim. The counterclaim alleged that Zenith had suffered large damages from the violation of the antitrust laws by Appellant, Hazeltine Corporation (15 U. S. C. §§ 1, 2 (the Sherman Act)). The violation of the federal antitrust laws alleged was the exclusion of Zenith from foreign markets, including Canada, by operation of patent pools of which Hazeltine Corporation was a member, which pools prevented the export of radio and television receivers by refusing to license under the pool patents any proposed licensee who did not manufacture in the excluded territory. After hearing, the Trial Judge entered findings of fact and conclusions of law in favor of Zenith and subsequently entered a joint and several judgment against Hazeltine Corporation and its wholly owned subsidiary, Hazeltine Research, Inc., in the trebled amount of $19,042,173. Both Hazeltine Corporation and Hazeltine Research, Inc. have appealed from this judgment (Nos. 15246 and 15247).

2. The motion filed by Hazeltine Corporation under this court's Rule 15(f) presents imported questions of fact and law and appellant has not filed any appendix showing

the evidence supporting the trial court's rulings as required by Rule 16(b) of this Court's rules.

3. This is not a case where a trial court has entered a judgment against a third party having no connection with the litigation, as is suggested in the motion and brief filed by Hazeltine Corporation. The record shows that Hazeltine Corporation was in the case by consent and agreement from the start, and that there was a pretrial stipulation entered into by the parties with the trial court's approval, which pretrial stipulation was as follows:

> "The parties to this action by their attorneys in fulfillment of certain understandings reached orally in the course of the pretrial conference held herein on April 3, 1963, in order to simplify and expedite trial hereby stipulate and agree, for purposes of this action only, as follows:
>
> * * * * * *
>
> 4. Plaintiff agrees that for purposes of this litigation plaintiff and its parent, Hazeltine Corporation, will be considered to be one and the same company."

This stipulation came into being because this affiant questioned Dodds as to whether or not his clients would take the position that Hazeltine Corporation was not bound by a judgment in the anti-trust counterclaim proceedings and Dodds said that neither the parent or the subsidiary would make any distinction between Hazeltine Research Inc., and Hazeltine Corporation; that the case could go forward as though the companies were one and the same. As stated in the stipulation it was the evidence of "understandings reached orally in the course of the pre-trial conference."

The stipulation was signed by counsel for Zenith and by L. B. Dodds, counsel for the plaintiff, and Dodds testified that he was a vice president of Hazeltine Corporation and had represented it as an attorney for many years. Sub-

sequently Hazeltine Corporation participated in the case in the same manner as if it had been named a formal party and served with process, and at the conclusion of the case asked for the entry of many specific findings of fact and conclusions of law in its favor. A copy of the requested findings and conclusions is attached hereto as Exhibit A. It was only after the court had refused to enter such findings and did enter findings submitted by the Appellee, in other words, after Hazeltine Corporation had lost the case, that it hired new counsel and sought to repudiate and disavow its stipulation and consent and actions throughout the trial which showed that it had appeared generally and had become bound by the trial court's judgment.

The trial court was fully aware of Hazeltine Corporation's jurisdictional contention at the time the judgment was entered herein. The same contentions made in the present motion were made before Judge Austin in post-trial motions. Hazeltine Corporation filed a motion and supporting brief in the court below and argued orally that judgment could not be entered against it. That motion was denied and judgment was entered.

Subsequently Hazeltine Corporation filed a petition for writ of mandamus in this court, asserting that the trial judge was without jurisdiction to enter judgment and raising the same contentions, and setting forth the same alleged facts as are in the instant motion. That petition was denied by this court on April 7, 1965.

4. In a supporting brief decisions are set forth showing that it is well settled law that a litigant asking for affirmative relief before a court waives any question of jurisdiction or venue over its person by the court from which it has asked relief. But apart from the legal questions the motion filed by Hazeltine Corporation presents the fundamental factual question of whether movant appeared generally in the case and invoked the jurisdiction of the trial court in

its own behalf. This factual question can only be determined on the basis of the entire record. Hazeltine Corporation acknowledges this by contending in its brief that Hazeltine's construction of the stipulation is confirmed by the conduct of the parties in the trial of the lawsuit after the stipulation was entered into. At page 7 of its brief, Hazeltine Corporation says:

> "At no time in the pretrial proceedings that followed the filing of the counterclaim, in the trial itself, or in the post-trial papers submitted before the proposed judgment did counsel for Zenith indicate any intention to construe this stipulation as making Hazeltine Corporation a party."

It is obviously impossible to determine the truth or falsity of that statement without an examination of the record upon which this appeal is based. At page 10 of its brief Hazeltine Corporation says:

> "Nothing that the parties did at the time of the execution of the stipulation or later would support a contention that the stipulation was intended either to bind Hazeltine Corporation or to make it a party to the suit."

It certainly was argued extensively in the court below by counsel for Zenith on the basis of the record that the stipulation was intended by Hazeltine Corporation *itself* to make it a party to the suit and to entitle it to any benefit it could obtain by findings entered in its behalf. Further, both of the statements quoted above are controverted by pages of the record, not included in the appendix attached to the Hazeltine Corporation brief. There are many examples of this, but it will suffice at this time to point out that L. B. Dodds, Hazeltine's chief trial counsel, testified at page 1294 of the record as follows:

> Q. "Just so that we will understand each other throughout this examination, except where it becomes

important, in referring to Hazeltine, we understand that it includes the Hazeltine companies generally."

A. "That is correct. There is a stipulation on the record that solely for the purposes of this action the plaintiff: Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

The trial record is replete with statements, testimony, and acts that show Dodd's authority to enter into the stipulation on behalf of Hazeltine Corporation and Hazeltine's consent and agreement to be bound by any judgments entered, all of which are obviously relevant, pertinent, and material to the determination of this motion.

5. The Hazeltine Corporation brief (p. 26) states that Hazeltine Corporation had nothing to gain by agreeing to be bound by the judgment in the case and, therefore, to put this construction on the stipulation is ridiculous. On the contrary, Hazeltine Corporation sought affirmative findings in its favor that the activities of the different foreign patent pools and Hazeltine Corporation's participation in these pools were legal, and did not violate the American antitrust laws. Hazeltine Corporation's annual revenue from foreign patent pools is very substantial. It therefore sought by the trial court's findings immunity to engage in illegal pools to the extent of hundreds of thousands of dollars every year. The nature of Hazeltine Corporation's involvement and its real interest in the litigation can only be appreciated after this court has had the benefit of the full record and a hearing on the merits in this and in the companion appeal by Hazeltine Research, Inc.

6. The hearing of any jurisdictional issue raised in Appellant's motion at this time will neither expedite the appeals nor avoid a hearing on the merits unless Zenith is to be deprived of its right to sustain the judgment by the record on appeal. The trial court admittedly had jurisdiction to enter judgment against Hazeltine Research, Inc.

and, regardless of the disposition of Hazeltine Corporation's motion, the companion appeal would still be pending on the merits. Further, the trial court had the right to determine on the record whether or not it had jurisdiction over the person of Hazeltine Corporation, and that determination can only be vacated if not supported by any substantial evidence.

7. Zenith Radio Corporation, the Appellee, would lose all rights of an Appellee in this case if this judgment was vacated on a piecemeal and inadequate record without the benefit of oral argument, and would thus be deprived of its judgment without a hearing and without the brief and appendix required by the rules of this court. The instant record shows that Hazeltine Corporation has been a member in a vicious international conspiracy which has continuously violated the federal antitrust laws and has caused great if not irreparable damage to Zenith's foreign business in electronics. The trial court has so held. With many millions of dollars at stake it is apparent that there can be no merit in Appellant's suggestion that Appellee's rights should be disregarded and the judgment vacated in a summary manner in disregard of a record showing the statements in movant's motion and brief to be false insofar as they allege that Hazeltine Corporation did not consent to and did not do acts constituting a general appearance in the instant case.

Further affiant sayeth not.

Thomas C. McConnell.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid on this 3rd day of August, 1965.

Francis J. Mardon,
Notary Public.

(Seal)

IN THE UNITED STATES COURT OF APPEALS.

(Caption—15247)

BRIEF OF APPELLEE ZENITH RADIO CORPORATION IN OPPOSITION TO HAZELTINE CORPORATION RULE 15(f) MOTION.

STATEMENT OF FACTS.

It is claimed in Appellant's brief (p. 3) that "Neither before nor after the filing of the counterclaim did Hazeltine Corporation participate in this litigation in any way." It is Appellee's position that since the above statement, as shown by the record is manifestly false, the whole contention of Hazeltine Corporation in its motion collapses because, as is shown in the following brief, Hazeltine Corporation asked for relief in the trial court and expressly stipulated itself into the case as a party, thereby submitting itself to the jurisdiction of the court below and thereupon becoming a party to the suit by its own voluntary acts.

As is shown by the Appendix to Appellant's brief (A42-43) L. B. Dodds, counsel for the plaintiff, signed a stipulation in the cause below on May 15, 1963, which stated:

> "The parties to this action, by their attorneys, in fulfillment of certain understandings reached orally in the course of the pretrial conference held herein on April 3, 1963, in order to simplify and expedite trial hereby stipulate and agree, for purposes of this action only, as follows:
>
> * * * * * *
>
> 4. Plaintiff agrees that for the purpose of this litigation plaintiff and its parent, Hazeltine Corporation, will be considered to be one and the same company."

After this stipulation was filed in the record Zenith filed, with leave of the trial court, its counterclaim for treble damages in this case. No attempt was ever made by Hazeltine Corporation to repudiate this stipulation until after findings of fact had been entered in the instant case by the trial court, Judge Richard B. Austin, on January 25, 1965, or almost two years after the stipulation had been filed and after the trial had proceeded to a decision in favor of Zenith. Even then no evidence was adduced by Appellant that either Dodds or Hazeltine Research, Inc. was not authorized by appellant to make the stipulation. As to his authority, the trial court record shows the following:

Dodds testified, at page 1294 of the transcript:

> "That is correct. There is a stipulation on the record that solely for the purposes of this action, the plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

At the time this testimony was given the Zenith counterclaim was being tried under the allegations whereby Zenith sought a treble damage recovery for damages caused its business by Hazeltine Corporation and its wholly owned subsidiary in the licensing of foreign patents under restrictive provisions formulated by foreign patent pools and which excluded Zenith from doing an electronic export business in Canada, England, and Australia.

In an affidavit dated May 10, 1963 and filed in the trial court Dodds described his connection with the Hazeltine Corporation as follows:

> "He had been retained by or employed by pla[illegible]f's parent company, Hazeltine Corporation, contin[illegible]ously since 1934 and has been a vice president of Hazeltine Corporation continuously since 1939 (except for a period during 1944-1945 when he had no connection with Hazeltine Corporation or any of its affiliates). He also was an officer of plaintiff, Hazeltine Research, Inc., from its organization in 1946 until June 7, 1961.

> Since 1946, he has been continuously familiar with the patents and the patent licenses of both plaintiff and its parent, Hazeltine Corporation."

The above affidavit was annexed to a Hazeltine memorandum in which, under the caption "Statement of the Case", Hazeltine counsel Dodds stated:

> "For the purposes of discussion, plaintiff finds it unnecessary to rely on the fact that it is a corporate legal entity separate and distinct from its parent, Hazeltine Corporation, and is willing that the two companies be considered as a single entity insofar as their respective foreign and domestic licensing operations are concerned."

In another affidavit dated September 12, 1963 and filed in this cause, Dodds said:

> "He is now and has been for more than twenty years trial counsel for plaintiff and its predecessor in business and parent company, Hazeltine Corporation, and has the responsibility for conducting the trial of the instant action."

During the time this testimony was taken and the above affidavits were filed Mr. Ruestow, also counsel of record in this case, stated that he was "general patent counsel for the Hazeltine Corporation, the parent corporation." A Mr. Westermann was called to the stand by Dodds, and he stated (Transcript pp. 898-899):

> "I am Vice President and General Counsel of Hazeltine Corporation * * *"

Both of said men were present during the course of the trial and were thoroughly aware of the stipulation that the two companies were to be considered as one entity, and never said one single word in repudiation of such stipulation.

At the conclusion of the evidence in the case, L. B. Dodds, as counsel for the two companies which he had stipulated

should be considered as a "single entity", asked for findings of fact and conclusions of law to be entered in favor of Hazeltine Corporation. We have attached the proposed findings submitted by Dodds as an exhibit to the McConnell affidavit.

Hazeltine Corporation is receiving substantial income each year* from the licensing of its patents in foreign pools and had been engaged in pooling arrangements with competitors of Zenith all over the world, and through this means had excluded Zenith from foreign markets. By its submitted findings and conclusions Appellant attempted to gain immunity from its antitrust violation by a judgment in its favor on the antitrust issues in the instant case.

Dodds, therefore, asked the trial court at the conclusion of the case to enter findings in favor of Hazeltine Corporation on practically every issue in the case. Such findings were 29, 30, 31, 32, 42, 47, 49(a), (b) and (c), 50, 51, 53, 55, 56, 57, 58, 60, 63, 64, 65, 66, 67, 68, 71, 82, 83 and 87 and, also, conclusions of law 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 15, 16 and 17. An example of these findings which clearly were for the benefit of Hazeltine Corporation is proposed Finding No. 82:

> "Neither Hazeltine nor Hazeltine Corporation has participated in any general plan or conspiracy the purpose and effect of which has been to restrain the export of radio and television receivers from the United States."

Finding No. 87 asked the trial court to hold:

> "There is no evidence linking Hazeltine or Hazeltine Corporation with members of the alleged international conspiracy."

In the conclusions of law submitted by Dodds he asked the court to hold, under Conclusion No. 9:

> "The bilateral agreement between Hazeltine Cor-

* Dodds said his purpose in joining pools "was to get more bucks for Hazeltine." (Tr. 429.)

> poration and CRPL currently in force is a lawful agreement the primary purpose and effect of which is to enable Hazeltine Corporation to obtain a fair royalty return under its Canadian patents."

Proposed Conclusion No. 10 provides:

> "The bilateral agreement between Hazeltine Corporation and CRPL currently in force does not constitute a contract, arrangement, plan, or conspiracy in restraint of trade between the United States and Canada."

Many of the statements contained on pp. 6, 7, 8, and 9 of Appellants brief find no support in the record below, and do not constitute statements of fact but merely argument on the part of counsel.

After the judgment was entered against Hazeltine Corporation that company filed a petition for mandamus on the ground that the District Court was without power to enter judgment against Hazeltine Corporation. In other words, the same contention was then made as is made in the instant motion namely, that the trial court did not have jurisdiction over the person of the Appellant. That petition was denied by this court on April 7, 1965. Hazeltine Corporation has made no other or different showing in the instant motion than was made on the petition for mandamus.

SUMMARY OF ARGUMENT.

The trial court had jurisdiction to enter judgment against Hazeltine Corporation because that company stipulated by its solely owned subsidiary and its own counsel and vice president that in this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity and Hazeltine Corporation pursuant to such stipulation sought affirmative relief in the court below and invoked the court's jurisdiction in its behalf, and the ruling made by the court below that it had personal jurisdiction over Hazeltine Corporation cannot be set aside on this record since there is substantial evidence to support it.

CONTESTED ISSUES.

1. Can a corporation after stipulating itself into a case by pretrial stipulation and asking for benefits from submitted findings of fact and conclusions of law repudiate its acts and the acts of its former counsel, hire new lawyers, and then claim after it has lost the case that the court had no jurisdiction over its person?

2. Can the rulings of a trial court that it has jurisdiction over the person of a plaintiff be summarily set aside where the appellant has made no showing that such ruling is not supported by evidence or has not shown that the ruling is clearly erroneous.

PROPOSITIONS OF LAW RELIED ON.

In Personam jurisdiction can be acquired by consent, agreement or waiver or by acts constituting a general appearance.

De Dood v. *Pullman Company*, 57 F. 2d 171 (C. A. 2, 1932);

Neirbo Company v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167 (1939).

2. The trial court had jurisdiction over the person of the Appellant because that corporation stipulated that it was the same legal entity as the plaintiff.

Petrowski v. *Hawkeye-Security Insurance Company*, 350 U. S. 495, 100 L. Ed. 639 (1956).

3. By asking for benefits and affirmative relief Appellant invoked the jurisdiction of the trial court and thereby consented to the jurisdiction of the district court of its person.

Merchants Heat & Light Company v. *Clow*, 204 U. S. 286, 51 L. Ed. 488 (1907);

North Branch Products, Inc. v. *Fisher*, 284 F. 2d 611, 615 (C. A. D. C., 1960);

Louisville & N. R. Co. v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747, 750 (1900);

Ocean Accident & Guaranty Corp. v. *Felgemaker*, 143 F. 2d 950, 952 (C. A. 6, 1944).

4. The trial court had jurisdiction over Hazeltine Corporation because that corporation assumed and participated in the defense of the counterclaim filed herein by Zenith.

Louisville & N. R. Co. v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747, 750 (1900);

Ocean Accident & Guaranty Corp. v. *Felgemaker*, 143 F. 2d 950, 952 (C. A. 6, 1944);

Greyhound Corp. v. *Leadman*, 112 F. Supp. 237, 239 (D. C. Ky., 1953);

Redman v. *Stedman Mfg. Co.*, 181 F. Supp. 5, 12 (D. C. N. C., 1960);

Mirabito v. *San Francisco Drug Co.*, 47 P. 2d 530 (Cal. App. 1935);

Thompson v. *L. C. Roney & Co.*, 246 P. 2d 1017 (Cal. App. 1952).

5. A parent corporation under Sect. 12 of the Clayton Act is subject to suit in a jurisdiction where its subsidiary can be sued if the subsidiary is, as here, stipulated to be the *alter ego* of the parent.

U. S. v. *Scophony Corporation*, 333 U. S. 795, 800, 92 L. Ed. 1091, 1093 (1948);

U. S. Watchmakers of Switzerland, 133 F. Supp. 40, 45 (D. C. N. Y., 1955);

Intermountain Ford Tractor S. Co. v. *Massey-Ferguson, Ltd.*, 210 F. Supp. 930 (D. C. Utah, 1962);

In re Grand Jury Subpoena Addressed to E. M. I., 1957 C. C. H. Trade Cases Par. 68, 773.

Argument.

I.

The Trial Court Had Power to Enter a Judgment Against Hazeltine Corporation Because That Corporation Submitted Itself to the Jurisdiction of the Court.

It is well settled that although litigants cannot confer subject matter jurisdiction on a court, they can determine the locality where the lawsuit is brought. If a court has jurisdiction of the subject matter under the Federal Anti-Trust laws, as it does here, it may acquire jurisdiction of the person of the defendant by his consent, either express or implied. Similarly, venue over the person of a litigant is a matter of personal convenience and can be viewed or lost by formal submission or through conduct.

Thus, in *Neirbo Company* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167, 84 L. Ed. 167, 170 (1939), the Supreme Court said:

> "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. . . .
>
> "Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."

And in *De Dood* v. *Pullman Company*, 57 F. 2d 171 (C. A. 2, 1932), the court held:

> "If a court has jurisdiction over the subject matter of a controversy, it may acquire jurisdiction over the person of a defendant by his consent as well as by its

> own lawful process. Such consent may be given in various ways . . . and may be subject to conditions; for example, a person beyond the territorial boundaries of a court may agree to submit himself to its jurisdiction provided notice of suit or a summons shall be there served upon him."

No one disputes that the trial court had subject matter jurisdiction, *i.e.*, power to adjudicate the antitrust issues raised by the counterclaimant; in fact, Hazeltine Corporation sought to have these issues adjudicated in its favor. Therefore, the only question is whether Hazeltine Corporation by consent, waiver, or conduct constituting a general appearance, submitted itself to the jurisdiction of the court.

In his opening statement Mr. McConnell, who tried the case for Zenith in the court below, said, at pp. 9-10 of the transcript:

> "As I say, the instant cross-claim alleges a conspiracy between the Hazeltine Corporation, and we have a stipulation in the record that the Hazeltine Corporation and its subsidiary companies are to be considered as one company in this proceeding. So we do not have to bother whether it is Hazeltine Research Corporation or the Hazeltine Corporation as it is in our arrangement with counsel, Mr. Dodds, that they are all to be considered as one company."

Far from taking exception to this statement, Mr. Dodds testified, at Tr. 1294:

> "That is correct. There is a stipulation on the record that solely for the purposes of this action, the plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

That the stipulation was not merely procedural but substantive and intended to give Hazeltine Corporation the benefit of any judgment entered in the case is shown by the fact that Dodds sought findings of fact and conclusions

of law which would have given Hazeltine Corporation immunity to violate the antitrust laws in Canada, England and Australia, and would have been *res judicata* as to Zenith's claim for damages under the antitrust laws against appellant. See *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747.

In seeking findings in its favor Hazeltine Corporation asked for affirmative relief and invoked the jurisdiction of the trial court, the same as if it had filed a counterclaim in the action. The authorities uniformly hold that where a defendant who is not lawfully served with process or subject to process, or as to whom venue is improper, files a counterclaim in the action, he thereby submits himself to the jurisdiction of the court.

In *Merchants Heat & Light Company* v. *James B. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488 the Supreme Court held (p. 489):

> "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. . . . But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. . . . This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences."

In *North Branch Products, Inc.* v. *Fisher*, 284 F. 2d 611, 615 (C. A. D. C., 1960), the Court of Appeals for the District of Columbia held that the trial court acquired jurisdiction of the defendant's person, notwithstanding his objection thereto, and even assuming that the counterclaim was a compulsory claim under FRCP Rule 13(a). The court held that a person who has voluntarily submitted his person to the jurisdiction of the court by seeking affirmative relief cannot avoid the consequences by later retracting. The court said (at p. 615):

"But the court had already obtained personal jurisdiction over defendant by his previously filed answer and counterclaim. By the latter he sought affirmative relief and thus invoked the court's jurisdiction. Appellee urges to the contrary that the counterclaim was compulsory under Rule 13(a), Fed. Rules Civ. Proc. 28 U.S.C., that is, had to be asserted when filed or be lost, since it arose out of the transaction or occurrence that was the subject matter of the complaint, and did not require the presence of a third party. It is said to follow that the answer and contemporaneously filed counterclaim did not operate to bring appellee within the District Court's jurisdiction. The District Court thought that the counterclaim was permissive. Whether or not is immaterial, for even if compulsory appellee was not compelled to pursue it unless served properly and could have filed a motion to quash the service attempted in reliance upon section 293. Rule 12(b) allows a challenge to jurisdiction of the person to be made by motion prior to the filing of an answer or counterclaim. Thus, were the counterclaim compulsory it need not have been asserted immediately but could await, without being lost, the disposition of a motion to dismiss for lack of jurisdiction over the person. See *Beaunit Mills, Inc.* v. *Industrias Reunidas F. Matarazzo, S.A.*, D.C.S.D.N.Y. 1959, 23 F.R.D. 654. If the motion were granted appellee would have been under no compulsion to file a counterclaim. Were the motion denied the objection to service could have been reasserted on appeal and if then sustained the interim filing of the counterclaim would not have waived the objection

"Appellee, having submitted voluntarily to jurisdiction over the person by the pleadings he filed, could not thereafter avoid the consequence by retracting."

In a separate but related line of cases it has been held that where a non-party assumes the defense of the case for the nominal party and thus, in effect, becomes the real party and seeks benefits, judgment may be entered against the non-party.

Thus, in *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747, 750 (1900) the Supreme Court held:

> "The claim of the plaintiff in error (the Louisville & Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defense. . . . But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville & Nashville became voluntarily, in the name of the Cincinnati & Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. . . . Clearly, also, the inevitable result of the conclusion of the court of appeals of Kentucky is that it was the duty of the Louisville & Nashville, having come in voluntarily in the cause to defend its interest, under the name of the technical defendant, if it had defenses which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville & Nashville to have followed it."

To the same effect is *Ocean Accident & Guaranty Corp.* v. *Felgemaker*, 143 F. 2d 950, 952 (C. A. 6, 1944), where the court said:

> "It has often been held that a person not technically a party to a judgment may be so directly connected with it by his interest in the result of the litigation and by his active participation in the suit as to be bound by the judgment. Inter Insurance contends that it is not a party to the case; but the term 'parties' frequently connotes more than merely parties to the rec-

ord of an action. Thus the doctrine of res judicata has been applied to persons who were not designated parties to the action, but had control of the prosecution or defense and exercise it in support of their own interest.

"As a development of the same doctrine, it is also frequently held that a judgment may be rendered directly against one who although not a formal party in the case, has assumed or participated in the defense."

See also *Greyhound Corp.* v. *Leadman*, 112 F. Supp. 237, 239 (D. C. Ky., 1953); *Redman* v. *Stedman Manufacturing Company*, 181 F. Supp. 5, 12 (D. C. N. C., 1960); *Mirabito* v. *San Francisco Dairy Co.*, 47 P. 2d 530 (Cal. App., 1935); *Thompson* v. *L. C. Rowey & Co.*, 246 P. 2d 1017 (Cal. App., 1952).

II.

There Is No Merit to the Hazeltine Corporation Contention That It Was Not Subject to Suit in the Northern District of Illinois, Eastern Division as Actually Hazeltine Corporation Was Found Within the District and Could Have Been Served With Process in New York.

The Hazeltine brief is premised on the erroneous proposition that being a foreign corporation it could not have been sued in the Northern District for Illinois, Eastern Division. However, in a civil antitrust case the plaintiff may file suit in the judicial district where the defendant corporation is "an inhabitant", or "found", or "transacts business", and service of process in such cases may be made anywhere in the United States. Section 12 of the Clayton Act (15 U. S. C. A. § 22) provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or trans-

> acts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

The record in this case shows that Hazeltine Corporation was both "found" and "transacting business" in the Northern District of Illinois by virtue of the identity of the Hazeltine Corporation with its wholly owned subsidiary, Hazeltine Research, Inc. Clearly venue was proper as to Hazeltine Research, Inc. It is an Illinois corporation with its principal offices in Chicago. Not only were the two Hazeltine companies stipulated to be one and the same, but Dodds, in a pretrial motion told the court:

> "Plaintiff finds it unnecessary to rely on the fact that it is a corporate legal entity separate and distinct from its parent, Hazeltine Corporation, and is willing that the two companies be considered as a single entity insofar as their respective foreign and domestic licensing operations are concerned."

Further, in a proposed finding (No. 8) submitted by Dodds, it was stated:

> "It is stipulated that for the purposes of this action Hazeltine and HC may be considered a single legal entity. * * *."

Thus, whether "a wholly owned subsidiary is not necessarily the agent of its parent", as argued by Hazeltine Corporation, is a rhetorical question on this record since in the instant case parent and subsidiary were stipulated to be the same and to be a single legal entity for the purposes of this litigation. The case was allowed to proceed on this basis without any objection from the parent until after the case was lost.

Apart from the stipulation Hazeltine Corporation's control over and exploitation of its subsidiary; Hazeltine Research, Inc. destroys any claim of corporate separateness

and the acts of the subsidiary are in contemplation of law the acts of the parent.

In the case of *In Re Grand Jury Subpoena Addressed to E. M. I. Ltd., Middlesex, England c/o E. M. I. (U. S.) Ltd.*, 1957 CCH Trade Cases, ¶ 68,773, the New York District Court held that E. M. I., the English company, was found in New York through its wholly owned subsidiary. The Court said:

> "Here as in the Scophony case E. M. I. relies upon the cases which hold that a manufacturing parent cannot be said to be present upon the basis of business done by a distributing subsidiary."

The Court held that a motion to quash the subpoena should be denied and that the English company was found in New York through its wholly owned subsidiary.

In the case of *United States* v. *Watchmakers of Switzerland*, 133 F. Supp. 40, 45 (D. C. N. Y., 1955) the court held that the defendant was present through a subsidiary and found in New York, stating with reference to the corporate separation sought to be interposed:

> ". . . [W]here the substance of corporate independence is not preserved and the subsdiary acts as an agent of the parent, this corporate separation has been found without significance * * * [I]t is a mere adjunct of its parents and its activities will be regarded as theirs."

The court then said (p. 47):

> "It is unrealistic to speak in terms of corporate separation when both have agreed that acts by one corporation visit penalties upon the other and that one as a member and in its dealings through FH sets the conditions for the actions of the other. To that extent the two affiliates do not deal with each other as independents and it is a sufficient dissolution of the corporate barrier to make the acts of one the acts of the other in determining 'presence'."

In the case of *United States* v. *Scophony Corporation,* 333 U. S. 795, 92 L. Ed. 1091, 1106 (1948) the Supreme Court held that a British company was "found" in the State of New York by virtue of the activities of its subsidiary company, American Scophony. The latter company was engaged in the exploitation in the western hemisphere of the patent rights of its foreign parent. The court said:

> "We think that Scophony not only was 'transacting business' of a substantial character in the New York district at the times of service, so as to establish venue there, but also on the sum of the facts regarding its activities was 'found' there within the meaning of the service of process clause of § 12."

In the instant case, as in *Scophony,* the two Hazeltine companies—parent and subsidiary—were acting for each other in the promotion of their respective patents. See Finding of Fact No. III, entered by the court below, stating:

> "* * * the parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity, operating as a patent holding and licensing company engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries."

III.

The Findings and Rulings of the Trial Court That It Had Jurisdiction Over the Person of Appellant Cannot Be Vacated and Set Aside Unless Appellant Shows That They Are Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Rule 16(b) of this court provides:

> "If appellant or petitioner raises a question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment, he shall include in the appendix all evidence pertaining thereto."

The trial court found (App. 19):

> "The parties stipulated that for the purpose of this litigation Hazeltine Research, Inc., and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries."

Certainly on the basis of this finding the court below was correct in holding it had personal jurisdiction over Appellant, and it so held by entering the judgment dated April 5, 1965 against Appellant (App. 1, 2 and 3).

It is stated at page 23 of the Appellant's brief that the circumstances which led to the execution of the stipulation are wholly inconsistent with any contention that Hazeltine Corporation was made a party to the suit by it. The circumstances leading to the execution of the stipulation occurred in pre-trial conferences in Judge Austin's chambers and are not known to present counsel for Hazeltine Corporation because such counsel were not present at the trial of this cause. Certainly the trial court was in a much better position to determine the effect, meaning and intent of a stipulation arising out of the pre-trial conferences than is a reviewing court. Rule 52(a) covers this situation.

Actually, as shown by the McConnell affidavit, Mr. McConnell raised the very question of whether or not Dodds was later going to take the position that Hazeltine Corporation would not be bound by any judgment entered in the antitrust suit, and in answer to that query and in a pretrial conference before the trial judge Dodds took the

position that his clients would make no distinction between Hazeltine Research, Inc., and Hazeltine Corporation; that the case could go forward as though the companies were one and the same.

Judge Austin was presiding at the time of such pretrial hearing, and knew of his own knowledge that these statements were made. Certainly he could give no credence to the argument now being urged on this court by counsel, who were not present in the pretrial proceedings, that the clear stipulations that were made did not mean what they said.

The law applicable to findings of the kind involved here is set forth in the following cases:

Zeddies v. *Com. Int. Rev.*, 264 F. 2d 120, 126 (C. A. 7, 1959).

Wisconsin Mem. Park Co. v. *Com. of Int. Rev.*, 255 F. 2d 751, 754 (C. A. 7, 1958).

Shapiro v. *Rubens*, 166 F. 2d 659, 661 (C. A. 7, 1948).

Conclusion.

For the reason stated above Zenith Radio Corporation requests that the motion of Hazeltine Corporation filed pursuant to Rule 15(f) be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—15247) * *

REPLY BRIEF IN SUPPORT OF RULE 15(f) MOTION TO VACATE JUDGMENT ON JURISDICTIONAL GROUNDS.

INTRODUCTION.

We appreciate that the grant of leave to file a reply brief on motions is unusual, and have requested such leave only because the answer, affidavit and brief filed by Zenith present new matter which we believe should be dealt with. First, through the affidavit of T. C. McConnell, Zenith has attempted the unusual procedure of seeking to support the judgment against Hazeltine Corporation by reference to an alleged conversation not in the record, and which was never previously asserted. The additional affidavit of L. B. Dodds, trial counsel for Hazeltine Research, Inc. (HRI), denying that such conversation took place, is attached to this brief and this new contention is dealt with herein. Secondly, Zenith has misrepresented the record in respects which we believe should be pointed out. Thirdly, Zenith has advanced some incorrect propositions of law which we believe should be answered. We have not, however, dealt with every incorrect assertion of fact or law advanced by Zenith but have confined ourselves to those which we believe are most significant.

In its brief, answer and affidavit Zenith argues that Hazeltine Corporation, although admittedly not named as a party or served with process, became a party to the action below by (1) "voluntarily submitting itself" to the jurisdiction of the court by stipulation; (2) invoking the jurisdiction of the trial court by "seeking affirmative relief and

the entry of findings in its favor''; (3) controlling the conduct of the litigation; and (4) engaging in ''actions'' constituting a general appearance. See Answer of Zenith to Motion To Vacate, paragraph 6, p. 3-4. As we shall discuss below, these contentions are totally lacking in support in the record of this case and, in several instances, are patently erroneous as a matter of law, even if they were supported factually by the record.

Zenith has also made some procedural arguments in an obvious effort to attempt to persuade this Court to postpone decision on this important question. We shall discuss these procedural points briefly below, but we turn first to Zenith's various substantive contentions.

I. Zenith's Contention That Hazeltine Corporation Entered Into the Stipulation Is Contrary to the Clear Language of the Stipulation and Unsupported By the Record.

Zenith's first contention that Hazeltine Corporation voluntarily submitted itself to the jurisdiction of the court by stipulation actually assumes the point in issue. It assumes that *Hazeltine Corporation* entered into the stipulation, but the record facts belie such a contention and Zenith has been able to cite absolutely no place in the record of this case which would support its contention that Hazeltine Corporation was a party to the stipulation.

A brief review of the Zenith arguments will illustrate the complete absence of any record support for Zenith's contention. First, Zenith relies upon the fact that Mr. Dodds, counsel for HRI who executed the stipulation, was a vice-president of Hazeltine Corporation and had represented it in other cases. But the mere fact that Mr. Dodds was a vice-president of Hazeltine Corporation and had represented Hazeltine Corporation in legal matters does not mean that a stipulation he signed on behalf of HRI and

expressly as its attorney, either bound Hazeltine Corporation or made Hazeltine Corporation a party to the stipulation.

Next, Zenith contends that the stipulation bound Hazeltine Corporation because officers of Hazeltine Corporation who testified at the trial did not repudiate the stipulation. But this contention ignores the facts that the stipulation did not purport to bind Hazeltine Corporation and that Hazeltine Corporation was not a party to it. Thus, there was nothing for the company's officers to repudiate. Of considerable significance is the fact that although some of the officers of Hazeltine Corporation did testify at the trial, Zenith's counsel has been unable to point to any testimony by those officers which would indicate that they considered Hazeltine Corporation either a party to the stipulation *or* a party to the suit.

Moreover, *no one* has *repudiated* the stipulation. HRI, the party in the suit and the party to the stipulation, has not repudiated the stipulation but has stood by it. The position of Hazeltine Corporation is that it was never a party to the stipulation and the stipulation by its clear intent and language did not and could not make Hazeltine Corporation a party to the litigation. The attack here is not upon the stipulation itself but upon the trial court's apparent conclusion that the stipulation of HRI somehow bound Hazeltine Corporation and made it a party to the suit.

Finally, in apparent recognition that the record is devoid of any evidence that Hazeltine Corporation was a party to the stipulation, Zenith resorts to bringing into the case by affidavit an alleged conversation purportedly leading to the stipulation. In his affidavit filed in opposition to this motion, Mr. McConnell, counsel for Zenith, asserts *for the first time* that the stipulation arose out of a question which he asked Mr. Dodds. The paragraph at the top of page three of Mr. McConnell's affidavit and the argument

at page 21 of Zenith's brief attempt to give the impression, without specifically saying so, that at a pretrial conference in Judge Austin's chambers, Mr. McConnell asked Mr. Dodds whether Hazeltine Corporation would take the position that it was not bound by a judgment on the antitrust counterclaim (which was not then filed) and that Mr. Dodds in response to that question specifically said that Hazeltine Corporation would not take that position.

While that is clearly the impression created, a close reading of the indicated paragraph of the affidavit and the argument reveals carefully chosen language which avoids stating precisely when and where this alleged conversation took place. Both the record in the case and the Dodds' affidavit filed herewith (Supp. App. A-46)* show that there was no such conversation.

Dodds unequivocally denies that any such conversation ever took place (Dodds' Aff. ¶ 4, Supp. App. A-48), and his denial is fully supported by the other facts in the record. Indeed, the stipulation itself and the record as it stands are wholly inconsistent with the purported existenec of any such alleged conversation.

Not only is there no record of this alleged conversation, but Mr. McConnell at no time during the record proceedings below ever asserted the existence of such a conversation. It was not mentioned in his oral argument or otherwise to the trial court below on the question of whether Hazeltine Corporation should be made a party to the judgment. Moreover, during the argument below on this issue, the trial court at no time suggested in any way that it was relying upon any such alleged conversation or that any such alleged conversation ever took place. In spite of the fact that the trial judge asked counsel for Hazeltine Corpora-

* References to "Supp. App. . . . ." are to pages in the Supplemental Appendix attached hereto, which pages continue in sequence with the pages of the Appendix filed in our original brief.

tion several questions during the course of the argument and in spite of the fact that Mr. McConnell argued extensively on this point, there was never any mention of any such alleged conversation. In fact, the court indicated by his comments that he had in mind that the issue was whether "a child" can "bind its parent" (Supp. App. A-51).

Further, during the oral argument, Mr. Kayser appearing specially for Hazeltine Corporation, contended that "neither party . . . had any *thought* or *intention* that this stipulation would bring the parent into the case" (Supp. App. A-51), and he expressly pointed out that the *first time* Hazeltine Corporation learned that Zenith contended it would be bound by the judgment was after the findings and conclusions had been entered (Supp. App. A-50). Mr. McConnell in his answering argument referred to a "pretrial conference . . . to determine . . . whether the proper parties were here . . . and there was a stipulation made out under the supervision of the Court. . . ." (Supp. App. A-56), but at no time did he make any reference to the conversation newly alleged in his last Tuesday's affidavit. If ever there was a time when Mr. McConnell would have "reminded" the court of the alleged conversation between Mr. Dodds and himself, had it taken place, that was the time. Yet, *no mention was made of it.*•

For the convenience of this Court, we have attached hereto in a Supplemental Appendix the transcript of the argument on April 2, 1965 before the trial court on the question of whether Hazeltine Corporation should be made a party to the judgment.

Finally, the clear and explicit language of the stipulation *drawn by experienced attorneys for Zenith* does not reflect

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• "Silence then becomes evidence of the most convincing character." Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226 (1939).

any such understanding or conversation. In fact, it is wholly inconsistent with the idea that the stipulation was an act of Hazeltine Corporation or a submission by it to the jurisdiction of the court.

Petrowski v. Hawkeye-Security Insurance Co., 350 U. S. 495 (1956), cited on page nine of Zenith's brief for the proposition the trial court could have jurisdiction over appellant by a stipulation, actually shows the procedure by which such jurisdiction *could* be obtained by stipulation. In that case, the defendant was named as a party and although he originally attacked the jurisdiction, he later entered into a stipulation which said:

> "That each of the parties to this stipulation voluntarily submits to the jurisdiction of the above entitled Court without service of process herein, the same as if personal service had been obtained by each against the other." 350 U. S. at 496.

This language, which is the obvious type of language one would use if it were intended that the stipulation constitute a voluntary submission to jurisdiction, contrasts sharply with the language of the stipulation in this case.

If the experienced trial counsel representing Zenith below who drafted the stipulation intended or believed that the stipulation was to constitute a voluntary submission to jurisdiction by Hazeltine Corporation, they would certainly have chosen language which would say so, and they would certainly have seen to it that the stipulation on its face showed clearly that it was intended as a submission to jurisdiction, that it was entered into by Hazeltine Corporation, and that the counsel signing it was described as being "Counsel for Hazeltine Corporation." Instead, they chose language which not only failed to show those facts, but clearly and explicitly shows that the stipulation was an agreement only *of HRI* and that Hazeltine Corporation was not a party to the stipulation.

II. Hazeltine Corporation Did Not Ask for Any Affirmative Relief at the Trial Below.

Zenith's second contention is that Hazeltine Corporation submitted to jurisdiction by "seeking affirmative relief and the entry of findings in its favor." (Zenith brief, p. 13; Zenith's Answer, p. 4.) This contention is apparently based on the fact that the attorney for HRI asked the trial court to enter findings and conclusions which would have found and concluded that certain conduct by Hazeltine Corporation was legal. Zenith claims that this is the same as filing a counterclaim by Hazeltine Corporation. But the proposed findings (which are actually not a part of the record in this case) do *not* ask for affirmative relief for Hazeltine Corporation.

HRI, the plaintiff and party represented by Mr. Dodds in the suit, was charged with being a co-conspirator with Hazeltine Corporation and had agreed that *it* could be considered the same as Hazeltine Corporation. Thus, it was perfectly natural for *it* to ask for findings and conclusions that certain conduct by Hazeltine Corporation was legal. But the fact that these findings and conclusions were proposed by HRI's attorney does not mean that *Hazeltine Corporation* was asking the court to enter them, even if they could be said to ask for affirmative relief, which they do not.

Obviously, the fact that a party asked for findings and conclusions approving of conduct of a particular non-party with which it is charged to be a co-conspirator cannot by that fact alone make the non-party subject to the jurisdiction of the court and transform him into a party to the action. The cases cited at page 13 of Zenith's brief (*Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U. S. 286 (1907) and *North Branch Products, Inc.* v. *Fisher*, 284 F. 2d 611, 615 (D. C. Cir. 1960)) do not support any such

proposition. They both involve the filing of a counterclaim expressly in the name of the party who is found to have submitted to the jurisdiction, and Hazeltine Corporation has filed no counterclaim, cross-claim or other claim in this suit.

III. Zenith's Contention That Hazeltine Corporation Became a Party by Controlling the Defense Is Absolutely Unsupported by the Record and Incorrect as a Matter of Law.

Zenith's third argument is that Hazeltine Corporation became a party to the case by "controlling the conduct of the litigation." (Zenith Answer, page 4; see also Zenith Brief pp. 10, 15-16.) There is no evidence to support this bald assertion and no finding on the subject. Indeed, the question of who was "controlling" the defense is not mentioned in the findings.

Moreover, even if it were factually true, Zenith's contention is patently erroneous as a matter of law. The two cases upon which Zenith relies most heavily for this proposition are *Louisville & N. R. R.* v. *Schmidt,* 177 U. S. 230 (1900) and *Ocean Accident & Guarantee Corp.* v. *Felgemaker,* 143 F. 2d 950 (6th Cir. 1944). Both of these cases are quoted from extensively by Zenith at pages 15 and 16 of its brief.

The *Ocean Accident* case was considered by this Court in its recent case of *Schnell* v. *Peter Eckrich & Sons, Inc.,* 279 F. 2d 594 (7th Cir. 1960), *aff'd,* 365 U. S. 260 (1961), cited and discussed in our brief at pages 12 and 15-18, and this Court expressly declined to follow it. 279 F. 2d at 596. Indeed, in *Schnell* this Court concluded that the open assumption and control of the defense by a non-party was *not* sufficient to give the trial court jurisdiction to enter judgment against the non-party. That decision, which was af-

firmed by the United States Supreme Court (365 U. S. 260) is, therefore, directly contrary to the proposition asserted here by Zenith.

This Court's rejection of *Ocean Accident* was joined by the Tenth Circuit which pointed out in *Alder* v. *Garcia*, 324 F. 2d 483, 486 (10th Cir. 1963) that the *Ocean Accident* case "has not been generally followed", citing *Schnell*.

The second case upon which Zenith places primary reliance is *Louisville & N. R. R.* v. *Schmidt*, a 1900 Supreme Court case. Actually, that case involved a separate proceeding under a rule to show cause as to which the company to be held had been made a party to the rule, was served, did answer, and did assert a setoff—all facts which make it clearly distinguishable from the instant case. Moreover, if the *Louisville* case is to be considered authority for the proposition that the assumption and control of the defense gives the trial court jurisdiction to enter judgment over a non-party, it is inconsistent with and in substance overruled by *Merriam Co.* v. *Saalfield*, 241 U. S. 22 (1916), and *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260 (1961), both later Supreme Court cases, holding that a judgment cannot be entered against a non-party even though that non-party controls and conducts the defense.

The other cases cited by Zenith on this point—district court cases from Kentucky and North Carolina and two lower California appellate court cases—all either do not support Zenith's contention or are inconsistent with the clear holding of this Court and the Supreme Court of the United States.*

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* Greyhound Corp. v. Leadman, 112 F. Supp. 237 (E. D. Ky. 1953), Mirabito v. San Francisco Dairy Co., 47 P. 2d 530 (Cal. App. 1935) and Thomson v. L. C. Roney & Co., 246 P. 2d 1017 (Cal. App. 1952) all involve "alter ego" or "shell" corporate entities; Redman v. Stedman Mfg. Co., 181 F. Supp. 5 (M. D. N. C. 1960), is a case in which a manufacturer assumed the defense of an infringement suit against its dealer, was designated as the real party in interest, *appeared, and requested that it be bound by the judgment.*

IV. Zenith's Contention That Hazeltine Corporation Did Acts Constituting a General Appearance Is Equally Without Foundation.

Zenith asserts that Hazeltine Corporation engaged in some unstated "actions constituting a general appearance" (Ans. p. 4). For this bald proposition it refers neither to the record of this case nor to any legal authority. That this catch-all contention is a sham emphasizes the fact that Zenith has been unable to call the Court's attention to any specific act *by Hazeltine Corporation* in the record of this case below which even remotely resembles conduct constituting a general appearance.

V. The Various Procedural Arguments Made by Zenith Are Wholly Lacking in Merit and Provide No Barrier to the Relief Sought by This Motion.

In a transparent attempt to becloud this clearly-defined jurisdictional question and to pursuade the Court to defer consideration of this motion, Zenith has asserted a variety of procedural objections. It has variously contended that (a) the Appendix filed with Hazeltine Corporation's opening brief is inadequate; (b) the trial court's conclusion that it had jurisdiction to enter judgment against Hazeltine Corporation is a matter under Federal Rule 52(a) which can be reversed only if "clearly erroneous;" and (c) Rule 15(f) of this Court does not authorize a motion attacking the jurisdiction of the trial court. However, as we shall briefly show, none of these contentions has any merit and none prevents this Court from vacating the judgment against Hazeltine Corporation on this motion.

A. The Appendix.

Zenith has repeatedly argued that the Appendix filed with appellant's brief is inadequate and that there is some-

where in this record other evidence which somehow supports the contention of Zenith that Hazeltine Corporation voluntarily submitted itself to the jurisdiction of the trial court and made itself a party to the suit (Zenith's Answer, ¶ 1, 3, 5 and 6; McConnell Affidavit ¶ 4).* Even if Rule 16 is applicable to the proceedings on a motion under Rule 15 (f), the obvious solution for Zenith, if the Appendix failed to set forth some evidence supporting its contention, would be to set forth those parts of the record in its own Appendix. But Zenith has failed to call attention to any part of the record which in any way tends to show that Hazeltine Corporation was a party to the stipulation or that Hazeltine Corporation submitted proposed findings or asked for affirmative relief or that Hazeltine Corporation conducted the defense or that Hazeltine Corporation did anything which would constitute either a general appearance or a submission to jurisdiction. The limited references to the record which are made by Zenith have been discussed above, and none of them evidences any action by Hazeltine Corporation constituting submission to jurisdiction.

B. Rule 52(a) of the Federal Rules of Civil Procedure.

Zenith is similarly in error in its contention that Rule 52(a) is applicable to this motion. By this motion, Hazeltine Corporation does not seek to set aside any finding. It does not contest the finding that there was a stipulation *between the parties,* i.e., HRI and Zenith. It does, however, contend that the legal conclusion that the trial court had jurisdiction to enter judgment against Hazeltine Corporation is not supported by that finding. The trial court is in no "better position" than this Court to determine the correctness of that legal conclusion, since that legal conclusion

* Mention is also made in paragraph 7 of the McConnell affidavit of the absence of oral argument. If that reference is intended as a request for oral argument and if the Court feels it would be helpful, we have no objection to oral argument on this motion.

can be set aside without disturbing the findings of fact of the trial court. *Plomb Tool Co.* v. *Sanger*, 193 F.2d 260, 264 (9th Cir. 1951); *Chandler* v. *United States*, 226 F.2d 403, 405 (7th Cir. 1955).

Actually, there is no finding of fact as to any of the purported bases asserted here by Zenith as supporting its contention that Hazeltine Corporation became a party to the suit. There is no finding as to the alleged conversation between Mr. McConnell and Mr. Dodds. There is no finding that Hazeltine Corporation was a party to the stipulation. There is no finding that Mr. Dodds was an agent of Hazeltine Corporation or had authority to speak for it or bind it. There is no finding that Hazeltine Corporation paid for or controlled the defense. There is no finding that HRI was a shell corporation* or was controlled or exploited by Hazeltine Corporation. In short, there is no finding of any fact which supports Zenith's contention here that Hazeltine Corporation became a party to the action below.

C. Rule 15(f) of this Court

Finally, Zenith asserts that Rule 15(f) of the rules of this Court is limited to motions raising questions as to the jurisdiction *of this Court*, and does not provide a procedure for attacking the jurisdiction of the trial court. But the language of the rule does not support Zenith's contention. It states:

"Whenever it appears that there is a substantial juris-

* While Zenith has cited and relied upon cases involving mere corporate shells (See *e.g.*, Greyhound Corp. v. Leadman, 112 F. Supp. 237 (E.D. Ky. 1953); Mirabito v. San Francisco Dairy Co., 47 P. 2d 530 (Cal. App. 1935); Thomson v. L. C. Roney & Co., 246 P. 2d 1017 (Cal. App. 1952)), it has never actually contended that HRI is a mere shell, as inded it could not. While HRI is a small corporation of modest resources compared to Zenith, it is nevertheless an adequately capitalized and operating company. It put up not only its very valuable United States Patents, but also $2,6000,000.00 of its own government securities as a part of the supersedeas bond agreement in this case.

> dictional question *in a cause pending on appeal,* such question may be raised by either party by motion, to determine the issue as to jurisdiction in advance of hearing on the merits. . . ." (Emphasis added).

Thus, the rule does not say that the question must involve the jurisdiction of this Court, but merely says there must be "a substantial jurisdictional question in a cause pending on appeal."

The obvious purpose of Rule 15(f) is to permit a prompt and separate determination of a substantial jurisdictional question (which is certainly present here) prior to a hearing and consideration on the merits. Invocation of this rule is especially appropriate here where, as we have pointed out, the existence of this judgment causes grave injury to Hazeltine Corporation, its business and its many public shareholders. It is respectfully submitted that if we are right that the trial court lacked jurisdiction to enter the judgment against Hazeltine Corporation, the cloud which that judgment creates over the company and its future should be removed promptly, particularly when, contrary to Zenith's contentions, the relevant facts and applicable legal principles are clear.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

IN THE UNITED STATES COURT OF APPEALS.

For The Seventh Circuit.

* * (Caption—15247) * *

AFFIDAVIT OF L. B. DODDS.

State of New York }
County of Queens } ss.

L. B. Dodds, being first duly sworn, deposes and says that:

1. He has been counsel for Hazeltine Research, Inc., the plaintiff in the action entitled *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* Civil Action No. 59 C 1847 before the United States District Court Northern District of Illinois, Eastern Division.

2. He has seen a copy of the Motion, Brief in Support and Appendix, filed by Hazeltine Corporation in cause No. 15247 in the United States Court of Appeals for the Seventh Circuit, and also the Answer, Affidavit of Thomas C. McConnell and Brief of Appellee, Zenith Radio Corporation, filed in opposition to Hazeltine Corporation's Motion to Vacate the Judgment as to it, including the following statements made by T. C. McConnell in his affidavit and in the supporting brief, concerning the April 3, 1963 pretrial conference and May 7, 1963 stipulation:

> "This stipulation came into being because this affiant questioned Dodds as to whether or not his clients would take the position that Hazeltine Corporation was not bound by a judgment in the antitrust counterclaim proceedings and Dodds said that neither the parent or the subsidiary would make any distinction between Hazeltine Research, Inc. and Hazeltine Corporation;

that the case could go forward as though the companies were one and the same. As stated in the stipulation it was the evidence of 'understandings reached orally in the course of the pretrial conference.'" (McConnell affidavit, paragraph 3.)

* * *

"Actually, as shown by the McConnell affidavit, Mr. McConnell raised the very question of whether or not Dodds was later going to take the position that Hazeltine Corporation would not be bound by any judgment entered in the antitrust suit, and in answer to that query and in a pretrial conference before the trial judge Dodds took the position that his clients would make no distinction between Hazeltine Research, Inc., and Hazeltine Corporation; that the case could go forward as though the companies were one and the same." (Zenith Brief, page 21.)

3. He has previously made an affidavit concerning the April 3, 1963 pretrial conference and the May 7, 1963 pretrial stipulation, to-wit: an affidavit dated March 29, 1965 which has been reproduced as a part of the Appendix filed by Hazeltine Corporation (Appendix A-27 to 30), but in view of the McConnell affidavit and statements has executed this additional affidavit in denial thereof.

4. He denies that at the pretrial conference on April 3, 1963, or at any other time, that T. C. McConnell asked him whether or not Hazeltine Corporation would take the position that it would not be bound by a judgment in antitrust counterclaim proceedings, denies that he ever said that Hazeltine Corporation would not take such a position, and denies that he ever stated that Hazeltine Corporation would be so bound; and he states that he neither had nor purported to have any authority to submit Hazeltine Corporation to the jurisdiction of the court in that litigation. He further states that the question as to whether Hazeltine Corporation would be bound by any such judgment never

came up until after the findings and conclusions had been entered by the district court.

5. The true fact is that, as outlined in his March 29, 1965 affidavit (A-28), his statement at the pretrial conference that Hazeltine Research, Inc. would not rely on the fact that it is a corporate entity separate and distinct from its parent, was made in connection with the question of production of documents, and that the question of Hazeltine Corporation, the parent, becoming liable on a judgment was never raised. Paragraph 4 was included in the stipulation of May 7, 1963, pursuant to the above agreement by him as counsel for Hazeltine Research, Inc., and said stipulation was signed by him specifically as "Counsel for Plaintiff", Hazeltine Research, Inc., and for no one else.

6. He further states that not only did T. C. McConnell not ask whether Hazeltine Corporation would take the position that it "was not bound by a judgment in the antitrust counterclaim proceedings" but further points out that at the time of the pretrial conference there were no "antitrust counterclaim proceedings" pending. At that time, Zenith counsel had served upon counsel for Hazeltine Research, Inc. a proposed antitrust counterclaim but the counterclaim was not filed until about May 22, 1963. Further, the proposed counterclaim named only Hazeltine Research, Inc. as a defendant and asked a judgment only against Hazeltine Research, Inc. and he first learned that an attempt would be made to impose liability on Hazeltine Corporation as well, the day following entry of the findings and conclusions, when he was informed that Zenith counsel had so stated to the Dow-Jones Company.

He denies that he signed the May 7, 1963 stipulation on behalf of or as counsel for Hazeltine Corporation, and points out said stipulation specifically designated him solely as counsel for Hazeltine Research, Inc.; and denies

that in the conduct of the case, he acted as counsel for, or on behalf of Hazeltine Corporation, or purported to do so, or in any way intended to subject it to the jurisdiction of the district court in the litigation, and states that he at no time ever had any authority so to do.

Affiant states that he has read the foregoing; that he knows the contents thereof; and that the same is true of his knowledge.

/s/ L. B. Dodds

Subscribed and Sworn to before me
this 5th day of August, 1965.
/s/ Helen O'Connor
Notary Public

Notary Public in and for the
County of Queens, New York.

Helen O'Connor
Notary Public, State of New York
No. 41-8188075
Qualified in Queens County
Certificate Filed Nassau County
Commission Expires March 30, 1966

IN THE UNITED STATES DISTRICT COURT.

389 [Caption Omitted]

Mr. Kayser: Well, now, your Honor, on the matter of the objection of the parent Hazeltine Corporation to being held on the proposed judgment, I have filed—our firm has filed a special appearance for the purpose of raising that point only, and I have filed with his Honor and given copies to Mr. McConnell of the memorandum which we have filed on that point.

Now, as I understand it, Mr. McConnell's statement, his proposed judgment which would bind the parent, is based solely and entirely on a stipulation made in this case.

Now I want to say first that the first time that it was made known that Mr. McConnell regarded Hazeltine Corporation as being in fact a party to this litigation occurred when a Dow Jones release was shown to the Hazeltine Corporation people a day or two days after your Honor entered the findings and conclusions. It was then indicated that Zenith or its counsel would ask that the judgment run against the parent as well.

390 Now, first, as concerns the subject matter of the stipulation, that is pretty much first and last and the whole thing. This stipulation, and a copy of it is attached to the memorandum, was entered into under date of May 7, 1963, at a time when, as now, the parties to the case were Hazeltine Research, Inc., plaintiff, and Zenith Radio Corporation, defendant. Those two were then, as they are now, the parties.

Now, this stipulation was stated to have been entered into pursuant to pretrial conference and in order to simplify and expedite the trial.

Paragraph 4 reads that plaintiff, which is Hazeltine Research, Inc., agrees that for purposes of this litigation

plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company. And who signed that stipulation? It was signed by Mr. L. D. Dodds, Counsel of Plaintiff, not counsel for plaintiff and Hazeltine Corporation, and it was signed by Mr. McDougall as well.

The Court: The basis of your argument, I assume, is that a child cannot bind its parent?

391 Mr. Kayser: That is part of it, but it goes beyond that, your Honor.

We are prepared to show that neither party here, until Mr. McConnell thought of it, had any thought or intention that this stipulation would bring the parent into the case.

Now, your Honor, this stipulation was drafted by counsel for Zenith, not counsel for Hazeltine. It was drafted by Mr. McDougall, and the paragraph 4 in here is the exact language which he submitted.

392 The Court: Mr. Dodds did not have a gun to his head when he signed it, did he?

Mr. Kayser: No, he did not, your Honor.

All right. Then the question is, what does the record show as to the meaning and intent of this stipulation?

Well, it shows first, your Honor, that the counterclaim which is here involved had been originally served—or, rather, notice to Hazeltine Research, Inc. back in March of 1963, or, roughly, a month or two before this stipulation was entered into.

Now, I will review the counterclaim from this point of view a moment later, but I will say in advance that no one reading that counterclaim would possibly suppose for a minute that Hazeltine Corporation was being named a counter-defendant. I will explain the very careful distinction which was made between the parent and the subsidiary in the counterclaim.

The Court: Well, of course, Hazeltine Corporation wasn't a party to the lawsuit.

Mr. Kayser: Yes, your Honor, you anticipated my next point, and that is when this counterclaim was
393 filed. It bears a date stamp of May 22, 1963. Actually, there is an indication that it may have been filed later, but there is a July date on it also. But, in any event, certainly it was filed after the stipulation.

Again, not only is the parent not named a party, but there are very clear distinctions between the parent and the subsidiary all the way through, as there were when it was originally submitted to Hazeltine Research back in March.

Now, what does this counterclaim say—and mind you, your Honor, this is post-stipulation—it names, still, Hazeltine Research, Inc. as plaintiff and counter-defendant.

Now, your Honor, we have heard at rather great length and with some repetition about the fact that Mr. McConnell has had forty years and forty very successful years at the bar.

Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody
394 liable on a judgment when he didn't even name them? He relied on some pretrial stipulation.

The Court: You mean that pretrial stipulations are worthless?

Mr. Kayser: No, they are not worthless, your Honor, but if Mr. McConnell ever had any thought of bringing Hazeltine Corporation into this case he would have done the obvious thing, he would have named them or he would at least have done the thing which he did in this afterthought in his findings of fact, talk about the two being treated as one. He didn't do that at all, your Honor. What

did he do? In paragraph 3 he specifically refers to counter-defendant Hazeltine Research, Inc. and says that it is a wholly-owned subsidiary of Hazeltine Corporation.

And in paragraph 4 he distinguishes again. And then, your Honor, when he comes down to the prayer for judgment for damages—this is on page 9 of my memorandum, and I earnestly request this court to consider that very carefully because it is very revealing. What did he pray for? First, he prayed for a judgment against counter-
395 defendant, a judgment against counter-defendant for treble the amount of damages sustained by defendant, that is Zenith, as the proximate result of said acts of counter-defendant and its co-conspirators and for costs and attorneys fees.

Now, everywhere through this complaint he has indicated clearly that he considers Hazeltine Corporation a parent to be a co-conspirator. But he does not ask for any judgment for damages against the co-conspirator, he wants judgment against the counter-defendant because of the acts of counter-defendant and its co-conspirators, including Hazeltine Corporation.

And then, further, your Honor, when you go to paragraph 2, the injunctive paragraph, he talks there, more broadly, about enjoining counter-defendant and anyone in privity with it from doing the acts there alleged.

Now, there he is specifically broadening it and, of course, as your Honor knows far better than I, under injunctive provisions there are circumstances where others who have notice, act in concert and so forth, may be served with a copy of the injunction and held liable to abide by it,
396 and so he says enjoining counter-defendant and anyone in privity. But when you get to the damage paragraph above he names solely Hazeltine Research, Inc.

Now, your Honor, this thing goes beyond this. I pointed out at page 10 that in Zenith's pretrial brief and post-trial

brief they again recognize the distinction, because in both briefs Mr. McConnell, Zenith says, plaintiff, plaintiff is a patent-holding and licensing company wholly owned by a large New York electronics company called Hazeltine Corporation. If ever there was an acknowledgment, a distinction between the subsidiary on the one hand and the parent on the other, your Honor, there it is.

397 But, again, Hazeltine made its position clear in its memorandum in which it said that plaintiff Hazeltine is an independent legal entity which must stand on its own feet and be responsible for operations. It is not subsidized by its parent HC, or Hazeltine Corporation.

Now, I say, your Honor, the record here is entirely clear. Now your Honor, I suppose, and properly, certainly, will ask, "Well, then, what does that stipulation mean? What is the reasonable construction of it?"

Your Honor, all that stipulation can possibly be held to mean, and I submit it is clear on this record, that all that it did mean is that as concerns the parties to this litigation, the parties to this litigation, namely, Hazeltine Research, that it would agree and stipulate that the acts of its parent would be considered as its acts. This stipulation had to do with the conduct of this litigation between these parties. It had nothing whatsoever to do as concerns any litigation with any corporation which was not a party. This was

398 an agreement with Hazeltine Research made as to how it could be regarded.

Now, your Honor, there are no appearances on file by Hazeltine Corporation. Counsel for Hazeltine Research never purported to act for Hazeltine Corporation. It signed the stipulation as counsel for Hazeltine Research, Inc., and the act or the action of Zenith now, at this late date, to try to reconstrue and rewrite the stipulation to this effect, well, frankly, it is another Park and Tillford situation where, again, at the last minute they try to bring in

Schenley and the court wouldn't do it, wouldn't permit it. But in this case he waits until the findings and conclusions are entered and then he comes up with this construction.

Now, your Honor, we have cited in our memorandum; we have cited the Supreme Court Case of Hansberry vs. Lee, and I want to read a part of the quote: It says:

"It is a principle of general application in—"

The Court: Was there a stipulation in that case?

399 Mr. Kayser: Sir?

The Court: Was there a stipulation in this case?

Mr. Kayser: Not to my knowledge.

The Court: All right.

Mr. Kayser: (Reading)

> "It is a principle of general application in Anglo American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

Now, your Honor, we submit that this is, in addition to all of the considerations, this is a question of due process as well. There is nothing in this record that could possibly justify it.

The Court: I'm glad to find out that due process applies to something besides criminal cases. That is the only time it has been raised lately.

Mr. Kayser: Well, your Honor, there is nothing in the stipulation or in this record, we submit, which would justify bringing in or justify any judgment against

400 the parent corporation.

The Court: Thank you.

Mr. McConnell?

401 Mr. McConnell: May it please the Court, we had a pretrial conference before this case started to determine what the issues were and whether the proper parties

were here, whether the case was ready to go forward, and there was a stipulation made out under the supervision of this Court, as is done in pretrial conferences. It wasn't drafted by one person, it was drafted by counsel in the case and approved by this Court. Paragraph 4 of that stipulation provides:

> "Plaintiff agrees that for purposes of this litigation plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company."

The man who signed that stipulation was on officer of the Hazeltine Corporation. Everything involved in this case in the way of patents and pools is the Hazeltine Corporation.

Mr. Dodds in this case made an affidavit dated May 10, 1963, in which he identified himself as follows:

402 "He has been retained by or employed by plaintiff's parent company, the Hazeltine Corporation, continuously since 1934 and has been a vice-president of said Hazeltine Corporation continuously since 1939 except for a period during 1944-1945 when he had no connection with Hazeltine Corporation or any of its affiliates. He also was an officer of plaintiff Hazeltine Research from its organization in 1946 until June 7, 1961, and since 1946 he has been continuously familiar with the patents and the patent licenses of both the plaintiff and its parent, the Hazeltine Corporation."

He filed another statement in his memorandum under the caption "Statement of the Case."

He stated:

> "For the purposes of discussion plaintiff finds it unnecessary to rely on the fact that it is a corporate legal entity separate and distinct from its parent Hazeltine
403 Corporation and is willing that the two companies be considered as a single entity insofar as their respective foreign and domestic licensing operations are concerned."

In another affidavit that he filed in this Court he identifies himself:

> "He is now and has been for more than twenty years trial counsel for plaintiff and its predecessor in business and parent company Hazeltine Corporation and has the responsibility for conducting the trial of the instant action."

Mr. Ruestow, who was also counsel of record in this case, testified at page 329 and 330 of the transcript:

> "I am general patent counsel of the Hazeltine Corporation, the parent corporation. I am an executive vice-president of the plaintiff Hazeltine Research."

He was a counsel of record in the case when this stipulation was filed.

404 Westerman said that he was vice-president and general counsel of the Hazeltine Corporation.

At page 1291 of the record Dodds testified as follows:

> "Q. What is your relationship to the Hazeltine Corporation?
>
> "A. I am on a retainer as a consultant and I am vice-president of the parent corporation without any official assignments.
>
> "Q. What proportion of your time do you spend on Hazeltine affairs?
>
> "A. Between thirty and forty per cent.
>
> "Q. Do you represent any other clients?
>
> "A. Yes, I do.
>
> "Q. When you say thirty to forty per cent you are speaking of your working time?
>
> "A. I am speaking of working time, yes."

405 Now, there isn't any question in the world that he was an agent for the Hazeltine Corporation, and if there was any question about it he disspelled it with his presentation here of findings of fact. Starting at page 9

with the foreign licensing practices of HC, which is Hazeltine Corporation, he asks for findings, all the way through, in his favor, Hazeltine Corporation. 29, the Hazeltine Corporation, CRPL agreement contains no restriction on the right of CRPL to license radio or television receivers, and so forth.

Hazeltine Corporation is not and at no time was a member of CRPL nor has it participated in the activities of that concern.

He wanted this Court to make findings of fact in his favor and asked that the Court exercise its jurisdiction to make those findings in favor of the Hazeltine Corporation. Oh, they are all the way through here, 14, 15, 16, 17, in Australia, in England—Hazeltine Corporation was the only one that was there.

And then we get down to the conclusions, and he asks 406 that the conclusions be written so as to give him benefits from this litigation, and a legal conclusion that its conduct was perfectly lawful. Finding 8, he wants a finding that the use of their patents, Hazeltine Corporation patents, does not constitute a contract, plan, arrangement or a conspiracy in restraint of trade even though the operations of the foreign concern in such country be lawful there it would be illegal if performed in the United States. The bilateral agreement between Hazeltine Corporation and CRPL currently in force is a lawful agreement.

He wants your Honor to enter that. He came in here asking your Honor to enter judicial determinations in his favor, in the Hazeltine Corporation favor, and he had a right to do it. We had all stipulated that they were in the case, that they were both parties with the same legal entity for the purposes of this lawsuit. And the damages, and all the rest of it, all the way through. If your Honor is familiar with those findings, and I am sure he is, it shows a

complete attempt to engage and to ask for and to receive a judgment in favor of the Hazeltine Corporation.

407 Now, there is a case here that went up in the Eastern District of Illinois, United States District Court, decided on July 12, 1955, University of Illinois Foundation, Plaintiff, against Block Drug Company, Amident, Inc., F. W. Woolworth Company and Chester J. Henschel, Defendants.

Mr. Kayser: What was that citation again?

Mr. McConnell: I haven't given it to you yet.

Mr. Kayser: All right, then, I will wait.

Mr. McConnell: 133 Fed. Supp. 580. It was affirmed in the Court of Appeals and certiorari was denied in the United States Supreme Court.

The plaintiff, University of Illinois Foundation, filed a suit against F. W. Woolworth Company, Amident, Inc. and Chester J. Henschel, alleging that the defendants have infringed upon their two patents. Personal service was obtained only upon F. W. Woolworth Company. The suit was dismissed as to the defendant Henschel.

"Now, bear in mind" that the Block Drug Company was not named as a party defendant in that case. The parties entered into a stipulation:

> "That the defense of this action is controlled or directed by Block Drug Company and Amident, Inc., by
> 408 whom defendants' attorneys have been retained and from whom defendants' attorneys receive instructions relative to the defense of this suit. All expenses are being paid by Amident, Block Drug Company, although defendant F. W. Woolworth Company is kept advised of the progress of the litigation and is agreeable to being represented by counsel here appearing on its behalf. Block Drug Company being Woolworth's supplier—"

The court went on and entered judgment against the Block Drug Company. It never formally appeared except through this stipulation.

The Court: And that was a stipulation merely that the Block Drug Company's lawyers represented Woolworth.

Mr. McConnell: Right, that is right, that was all.

The court held it had jurisdiction over them and entered a judgment against them. It was appealed and it was affirmed. We have a much stronger case than that here.

Here is a party that stipulated not only with us but
409 with this court that these parties were the same.

Now, we have a simple proposition before us here. Can parties come into this court and make stipulations with the court and then go off and say, "Oh, no, that is something else. We weren't authorized to do anything like that." Can they come in here and ask your Honor to act in their behalf and then say that they are not here?

I think a court—I don't say this in any way, any possible critical, derogatory way, but I am just speaking in a general way of a court that would stultify itself to permit litigants to come in and take those positions in its court and then change the position to the detriment of the court and the trial and the litigation and the parties and take a different position and repudiate its solemn agreements with the court and with counsel. And I most respectfully suggest that is exactly what this Hazeltine Corporation now is attempting to do. Be here as long as they thought it was to its advantage and could get an advantage and a finding and an adjudication through its stipulation, but when it turns out the

other way, repudiate the stipulation and walk away
410 from this whole thing and say, "No, we have no part of this thing. We have no liability here. You never had any power over us at all."

I say it is absolutely an outrageous proposition for a litigant to take after what has gone on in this trial. And

it is part and parcel of just what we have been hearing here for the last three days.

I am perfectly willing to submit anything that your Honor wants that can help your Honor in anything it has to do with the determination of this case, but there comes a time—

The Court: I think I said that first three days ago.

Mr. McConnell: —when this thing should end, and I submit the time has come. There is nothing to this position. The cases that he cites are cases of venue where parties didn't submit themselves. This man came in here through—this litigant came in here through their vice president knowing exactly what was involved in the case and asking for relief of this court through his proposed findings and stipulated solemnly here in this court and then attempts to repudiate it and walk away from it.

411 As I have said, I suggest it is an outrageous thing.

As I say, I am willing to submit anything that your Honor wants, but I think by Monday we ought to have a judgment entered in this case.

The Court: I think I have indicated to you that you are going to have a disposition of this by Monday, and it is because of my desire to extend the courtesy to Mr. Kayser and his office on their work product on which I am sure they labored into the wee hours of the night that I am not proceeding today.

412 Mr. Kayser: Your Honor, I have a very few brief remarks in reply to Mr. McConnell. He asks the question can parties come into this Court and ask relief and then repudiate the fact that they came into this Court. But there, your Honor, is the key, can parties come into this Court? And we submit that it is clear in the entire record here that Hazeltine Corporation never did come into this Court. They never purported to. They never atempted to. And the only thing that was agreed, and this has direct ref-

erence to Mr. McConnell's comments about these findings, the only thing that was agreed was that Hazeltine Research, Inc., the party—

The Court: How do you get around the Woolworth case where—

Mr. Kayser: Your Honor, that was another point I was coming to, and that is this; Mr. McConnell knows fully well that there is this doctrine in patent litigation in which when the defense is tendered and accepted that the party undertaking that defense will be bound at least as concerns the question of validity infringement of claims, and I
413 would like—we shall get these forces together again —I am perfectly familiar with that rule and will give your Honor a littel memo on it. I don't think it has any relevancy here.

The Court: I don't think a memo is necessary.

Mr. Kayser: Well, I know, but he cited a rule your Honor that I think has no—

The Court: I mean, is this a rule of law, a practice a statute?

Mr. Kayser: There are many cases. This is one of the problems that any patent owner faces when a supplier of his is sued, should he come in and defend or not, because if he does not he may have an adverse adjudication because the case wasn't handled as it should be.

The Court: I understand the moral obligation of a patent owner to defend one of his dealers who—

Mr. Kayser: That is right.

The Court: —has been the object of somebody's wrath. I understand that.

Mr. Kayser: I beleive that rule has absolutely no
414 applicability here whatsoever.

All I can say further on this, your Honor, is to ask you honestly to read and consider our memorandum which I think states our position.

The Court: I intend to.

Mr. Kayser: Now, as concerns Hazeltine Research, Inc., we have raised some questions concerning the injunctive paragraph because we believe there are some uncertainties involved there and we are suggesting certain amendments to those paragraphs to clarify them and there isn't really a thing I can say on those proposed amendments that is not in the memorandum. I think we have covered it as thoroughly—

The Court: I am sure, having read other memoranda of yours in recent days, that you make yourself and your points sufficiently clear in your memorandum without any aid or oral arguments.

Mr. Kayser: What we are really saying is while we, as your Honor well knows, do not agree that any injunction should be entered, we have pointed out that if it is to be there are certain clarifications which we feel should
415 be made in the paragraph as submitted by Zenith.

The Court: And that applies to both the misuse paragraph and the pool paragraph.

Mr. Kayser: Yes.

The Court: All right.

Well, I want to see what you have to say about it and I will see you at 10:15 Monday morning.

(Whereupon, the above-entitled cause was adjourned until 10:15 o'clock a.m. Monday, April 5, 1965.)

UNITED STATES COURT OF APPEALS.

Monday, August 16, 1965.

Before Hon. Latham Castle, Circuit Judge.

(Caption—15247)

On consideration of the motion of appellant for leave to file instanter its reply brief with supplemental appendix.

IT IS HEREBY ORDERED that leave be granted to file instanter the reply brief of appellant in support of Rule 15(f) motion to vacate judgment on jurisdictional grounds with supplemental appendix, presently lodged in the office of the Clerk of this Court.

IT IS FURTHER ORDERED that the motion of appellant under Rule 15(f) to vacate judgment on jurisdictional grounds be taken with the case.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois

March 1, 1966

Before Hon. Latham Castle, Circuit Judge.

Hazeltine Research, Inc.,
Plaintiff-Appellant,
vs.
Zenith Radio Corporation,
Defendant-Appellee,
No. 15563

Hazeltine Corporation,
Appellant,
vs.
Zenith Radio Corporation,
Appellee.
No. 15564

This matter coming on for consideration on the motion of Hazeltine Research, Inc., appellant:

1. For entry of an order consolidating the instant appeal, Appeal No. 15563 docketed in this Court on February 17, 1966, with Appeal No. 15246 (Hazeltine Research, Inc. v. Zenith Radio Corporation) docketed in this Court on July 15, 1965.

2. For entry of an order providing that one Appendix be printed for the four appeals in this case, to wit, Appeal Nos. 15246, 15247 (Hazeltine Corporation v. Zenith Radio Corporation), 15563 and 15564 (Hazeltine Corporation v. Zenith Radio Corporation), with the portion of the Appendix covering the records in the latter two appeals, Appeal No. 15563 and Appeal No.

15564 to follow consecutively the portion of the Appendix covering the records in the former two appeals, Appeal No. 15246 and Appeal No. 15247.

3. For entry of an order providing that Appellant file its briefs covering the antitrust issues of Appeal No. 15246 and Appeal No. 15563, and the patent issues of Appeal No. 15246, thirty (30) days after completion of the printing of such Appendix;

and upon the motion of Hazeltine Corporation, appellant:

1. For entry of an order consolidating the instant appeal, Appeal No. 15564, docketed in this Court on February 17, 1966, with Appeal No. 15247 (*Hazeltine Corporation* v. *Zenith Radio Corporation*) docketed in this Court on July 15, 1965.

2. For entry of an order providing that one Appendix be printed for the four appeals in this case, to wit, Appeal Nos. 15246 (*Hazeltine Research, Inc.* v. *Zenith Radio Corporation*), and 15564, with the portion of the Appendix covering the records in the latter two appeals, Appeal No. 15563 and Appeal No. 15564 to follow consecutively the portion of the Appendix covering the records in the former two appeals, Appeal Nos. 15246 and 15247.

3. For entry of an order providing that Appellant file its brief in Appeal Nos. 15247 and 15564, thirty (30) days after the completion of the printing of such Appendix;

the response of Zenith Radio Corporation, Appellee, to said motions; and the reply of Hazeltine Research, Inc., and Hazeltine Corporation thereto;

It Is Ordered that each of said motions be and is hereby allowed without prejudice to the presentation of any issue on appeal.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, July 7, 1966

Before Hon. Elmer J. Schnackenberg, Circuit Judge.

Hazeltine Research, Inc.,
Hazeltine Corporation,
Plaintiffs and Counter-Defendants-Appellants,
No. 15246, 15247 *vs.*
Zenith Radio Corporation,
Defendant and Counter-Claimant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of counsel for appellants, Hazeltine Research, Inc. and Hazeltine Corporation, and stipulation of counsel for the parties,

It Is Ordered that the record herein be corrected by the addition of the following described documents, which were omitted from the record on appeal:

A. Foreign Information Service Bulletin No. 2,105, dated March 28, 1960;

B. Copy of letter dated April 21, 1960, from Walter R. Peirels, Assistant Sales Manager, International Division, to Edmund E. Jarvis, Trade Commissioner, Australian Trade Commission; and

C. Letter dated July 18, 1960, from E. E. Jarvis, Trade Commissioner, Australian Government Trade Commissioner, to Walter R. Peirels, Assistant Sales Manager, International Division, Zenith Sales Corporation; all of which were a part of Zenith's bulk exhibit 215 (DX 215) at the trial of this case.

[Filed December 6, 1966]

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.
(Caption—Nos. 15247 and 15564)

MOTION TO VACATE DECEMBER 13, 1965, JUDGMENT ON JURISDICTIONAL GROUNDS AND TO INCORPORATE HEREIN PRIOR RULE 15 (f) MOTION TO VACATE APRIL 5, 1965, JUDGMENT, AND BRIEFS, AFFIDAVIT AND APPENDICES FILED IN SUPPORT THEREOF.

To: The Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Appellant, Hazeltine Corporation, by its attorneys, pursuant to Rule 15(f) of this Court's rules, moves this Court to vacate the second judgment entered against it on December 13, 1965, in an action entitled *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* Civ. No. 59 C 1847, for lick of jurisdiction over appellant. In support of this motion appellant Hazeltine Corporation relies upon the Motion under Rule 15(f) to vacate the first judgment entered against it on April 5, 1965, in the same cause, and on the grounds therein stated, which Motion was heretofore filed with this Court on July 23, 1965, and also relies upon the accompanying affidavit with the Supporting Brief and Appendix and its Reply Brief and Supplemental Appendix filed August 16, 1965, and requests that this Court permit the Motion of July 23, 1965, together with said affidavit, Supporting Brief, Reply Brief and Appendices to be considered as though filed in Appeal No. 15564 on appeal from the judgment of December 13, 1965. As grounds for its motion, movant states:

1. On April 5, 1965, the court below in an action en-

titled *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, Civ. No. 59 C 1847, entered a judgment against Hazeltine Corporation. On the same day, April 5, 1965, Hazeltine Corporation filed a petition for mandamus asking this Court to issue a writ of mandamus or prohibition on the basis that the district court was without power to enter the judgment against it; this petition was denied on April 7, 1965. Hazeltine Corporation then appeared specially and gave notice that it was appealing to this Court.

2. On July 23, 1965, Hazeltine Corporation filed its motion under Rule 15(f) to vacate the judgment against it below on jurisdictional grounds, together with supporting affidavit, brief and appendix. On August 16, 1965, pursuant to leave, a reply brief and appendix was filed in support of the motion.

3. Pursuant to order of this Court, on August 11, 1965, Hazeltine Corporation's main brief on the merits will be due on December 14, 1966, 30 days after the filing of the printed appendix herein.

4. On August 16, 1965, this Court ruled that the Rule 15(f) Motion would "be taken with the case."

5. On December 13, 1965, the court below entered a second judgment against Hazeltine Corporation in the same action, *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, Civ. No. 59 C 1847. On December 29, 1965, Hazeltine Corporation appeared specially and gave notice that it was appealing to this Court from said judgment.

6. On March 1, 1966, this Court entered an order consolidating the appeal from the second judgment, Appeal No. 15564 docketed on February 17, 1966, with the appeal from the first judgment, Appeal No. 15247 docketed on July 15, 1965, "without prejudice to the presentation of any issue on appeal."

7. Inasmuch as the same factual situation with respect

to the district court's lack of jurisdiction over Hazeltine Corporation exists in respect of the judgment of December 13, 1965, as exists in respect of the judgment of April 5, 1965, the same grounds for objecting to the jurisdiction of the district court to enter the first judgment apply to the power of that court to enter the second judgment. However, since this Court has ruled that the jurisdictional question as to the power of the district court to enter the first judgment will be decided at the hearing on the merits, Hazeltine Corporation is not asking that the like question as to the power of the court below to enter the second judgment be determined in advance of the hearing on the merits.

8. Rather than repeat the motion under Rule 15(f) to vacate the judgment below and the supporting matters set forth in the affidavit and the briefs and appendices filed on July 23, 1965, and on August 16, 1965, appellant Hazeltine Corporation seeks to have said motion, affidavit, briefs and appendices incorporated into Appeal No. 15564 as though filed again but subsequent to the judgment of December 13, 1965.

9. In the event that appellant Hazeltine Corporation's motion under Rule 15(f) to vacate the judgments entered against it on April 5 and December 13, 1965, is not granted, Hazeltine Corporation joins in the brief on the merits which will be filed herein by its subsidiary Hazeltine Research, Inc., the plaintiff in the action below.

WHEREFORE, appellant Hazeltine Corporation respectfully prays that this Court enter an order providing that its prior Rule 15(f) motion, supporting affidavit and briefs and appendices be incorporated in Appeal No. 15564 as though filed herein in specific reference to said December 13, 1965, judgment.

UNITED STATES DISTRICT COURT OF APPEALS.

(Captions—15246-7, 15563-4)

ORDER.

The court having directed the parties hereto to agree on the form of an order in connection with the motion of Hazeltine Corporation to vacate the December 13, 1965 judgment as to it and for other relief, and the answer thereto filed by Zenith Radio Corporation; and the parties, pursuant to the court's direction, having agreed to the form of the following order.

It Is Ordered:

1. Hazeltine Corporation's motion to incorporate as part of its motion to vacate the December 13, 1965 judgment, briefs, affidavit, and appendices heretofore filed with its motion to vacate the April 5, 1965 judgment, is granted;

2. Hazeltine Corporation's motions under Rule 15(f) to vacate the April 5, 1965 and December 13, 1965 judgments are taken with the case, and Hazeltine Corporation's brief heretofore filed with its Rule 15(f) motion to vacate the April 5, 1965 judgment will constitute its initial brief on appeal in support of the jurisdictional grounds raised by the aforesaid Rule 15(f) motions:

3. At the same time Zenith Radio Corporation files its answer brief on the merits in appeal Nos. 15246, 15247, 15563, and 15564, it may file either as a separate brief or as a part of its brief on the merits its answer brief to Hazeltine Corporation's jurisdictional motions under Rule 15(f).

4. At the same time reply brief on the merits shall be due, Hazeltine Corporation may file a reply brief in support of its jurisdictional motions under Rule 15(f).

Approved, this 13th day of December, 1966—

Hastings. C. J.

Agreed to as to form:

Victor P. Kayser,
Attorney for Hazeltine Corporation, Appellant.
Francis J. McConnell,
Attorney for Zenith Radio Corporation, Appellee.

UNITED STATES COURT OF APPEALS.

(Captions—15246-7, 15563-4)

Tuesday, December 20, 1966

Before Hon. Win G. Knoch, Circuit Judge.

On consideration of the motion of counsel for defendant-appellee Zenith Radio Corporation to correct omissions in the record on appeal, and the stipulation of counsel for the parties with said motion,

It Is Hereby Ordered that the said motion be granted and than leave be granted to file instanter the true and correct copies of omitted items described as exhibits A & B and attached to said motion and stipulation, and that the same be made part of the record on these appeals.

IN THE UNITED STATES COURT OF APPEALS.
* * (Captions—15246-7, 15563-4) * *

STIPULATION TO CORRECT OMISSIONS IN RECORD ON APPEALS.

The parties to the above numbered appeals, by their respective attorneys, hereby stipulate that the following omitted items be made part of the record on said appeals:

a) Plaintiff's proposed findings of fact and conclusions of law with respect to the defense of misuse and defendant's counterclaim under the antitrust laws, filed by plaintiff with the Court below on or about June 8, 1964, a true and correct copy of the same being attached to this motion as Exhibit A.

b) Page 951 of the transcript of proceedings before the Court below in this cause on February 20, 1964, being part of the cross-examination of David Westermann, a true and correct copy of the same being attached to this motion as Exhibit B.

Dated this 9th day of December, 1966.

Victor P. Kayser,
One of the attorneys for Appellant, Hazeltine Corporation,

Victor P. Kayser,
One of the attorneys for Appellant, Hazeltine Research, Inc.,

Francis J. McConnell,
One of the attorneys for Appellee, Zenith Radio Corporation.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit,

Chicago, Illinois 60604.

Monday, February 27, 1967

Before

Hon. John S. Hastings, Chief Judge

* * (Captions—15246-7, 15563-4) * *

This matter comes before the Court on the motion of counsel for appellants for a special setting of the time for oral argument, for additional time for oral argument and for permission to have argument by additional counsel, with affidavit in support; answer of appellee to said motion; and reply of appellants to answer of appellee.

On consideration whereof, It Is Hereby Ordered that

a. A total of two and one-quarter hours for the oral argument on each side in the four appeals is hereby granted;

b. Leave is hereby granted to counsel on each side to divide the time allowed for oral argument as they may elect to do;

c. The date for the oral argument of these appeals will be fixed at the convenience of the Court as the Calendar for the April 1967 Session of this Court is set.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit,

Chicago, Illinois 60604.

December 13, 1967

Before

Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

Nos. 15246, 15563 Hazeltine Research, Inc. v. Zenith Radio Corporation, and Nos. 15247, 15564 Hazeltine Corporation v. Zenith Radio Corporation.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

The court has fully considered the briefs and appendices filed in these appeals and has heard thorough oral arguments on the issues. Having reached its conclusion, the court now announces its decision and enters judgment in accordance with and for the reasons given in its opinion now being prepared for printing and to be filed forthwith.

We enter the following judgment:

(1) The judgments of the district court against Hazeltine Corporation are vacated for want of jurisdiction over its person.

(2) The judgment of the district court holding Hazeltine Research, Inc.'s patent in suit invalid is affirmed.

(3) The part of the judgment of the district court for Zenith Radio Corporation, and against Hazeltine Research, Inc., with respect to its domestic patents, for treble damages in the amount of $150,000 is affirmed.

(4) The part of the judgment, with respect to foreign patents, for the difference between $34,961,631 and $150,000, or $34,811,631 is reversed.

(5) The injunction is modified by striking from the decree the restraint against Hazeltine Research, Inc. in so far as it is based on Hazeltine Research, Inc.'s alleged antitrust conspiratorial violations with respect to foreign patent pools. We further modify the injunction to some extent with respect to the patent misuse by Hazeltine Research, Inc. in the United States.

(6) And the cause is remanded to the district court for the sole purpose of entering judgment in favor of Zenith against Hazeltine Research, Inc. in the amount of $150,000 and of entering a modified injunction in accordance with our opinion.

It is further ordered by the court that Hazeltine Corporation recover from Zenith Radio Corporation, Hazeltine Corporation's costs in Appeals Nos. 15247 and 15564.

It is further ordered by the court that the costs in Appeals Nos. 15246 and 15563 be divided equally between Hazeltine Research, Inc. and Zenith Radio Corporation.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit

Nos. 15246, 15247, 15563, 15564

SEPTEMBER TERM AND SESSION, 1967

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,

15246, 15563

vs.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

HAZELTINE CORPORATION,
Plaintiff and Counter-Defendant, Appellant,

15247, 15564

vs.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the of Illinois, Eastern Division.

December 19, 1967

Before CASTLE, KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This infringement suit was begun by Hazeltine Research, Inc. (HRI) in November, 1959, against Zenith Radio Corporation for patent infringement. In May, 1963, Zenith counterclaimed, seeking treble damages for HRI's violation of the antitrust laws in the

use of its patents. The district court entered judgments[1] against HRI and Hazeltine Corporation, its parent, on the issues of validity, infringement, patent misuse and antitrust violations, and awarded treble damages of $34,961,631 to Zenith on its counterclaim. HRI has appealed from the judgments against it. Hazeltine Corporation has made a motion to vacate the judgments against it and has filed provisional appeals from the judgments.

We vacate the judgments against Hazeltine Corporation. We affirm the district court judgment holding the patent in suit invalid. We affirm the judgment of the district court for Zenith, and against HRI, with respect to its domestic patents for treble the amount of $50,000, or $150,000. We reverse the judgments for treble damages based upon HRI's alleged participation in foreign patent pools in violation of the antitrust laws. We modify in some respects the injunction issued by the district court. And we remand for the sole purpose of entry of a judgment against HRI and for Zenith in the amount of $150,000 and entry of a modified injunction in accordance with this opinion.

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1. On April 5, 1965, the district court entered judgment against HRI and Hazeltine Corporation on the issues of infringement, validity, patent misuse and on the issues raised by Zenith's counterclaim relating to patent misuse and the Canadian patent pool. The damages as trebled amounted to $150,000 for patent misuse and $18,892,173 for the alleged antitrust violations arising from participation in the Canadian patent pool. On December 13, 1965, the district court entered judgment against HRI and Hazeltine Corporation in the amount of $15,919,458 as treble damages for alleged injuries to Zenith because of allegedly unlawful conduct of English and Australian patent pools.

Hazeltine Corporation's Motions

Under Rule 15(f)[2] of this court Hazeltine Corporation has made motions to vacate the judgments against it, upon Zenith's counterclaim, as void for want of jurisdiction over its person. We ordered that the motions be taken with the case on the full record.

Hazeltine Corporation is sole owner of HRI. The Corporation is engaged primarily in the business of research, development and manufacture of electronic equipment for military and commercial use. HRI is engaged primarily in research, development, ownership and licensing of United States patents relating mainly to radio and TV. The Corporation was not named as a party in the counterclaim, was not served with process, did not participate in the trial and filed a "special appearance" contesting entry of judgment after the district court adopted findings of fact and conclusions of law naming the Corporation as a party for the first time.

The district court found that "the parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries." The court made no other findings relating to "piercing the corporate veil," and our reading of the colloquys between counsel and the court leads us to the conclusion that the stipulation was the principal if not the only basis for binding the Corporation in the judgments.

Hazeltine Corporation contends that the trial court had

2. Rule 15(f) of this court provides that a substantial jurisdictional question may be raised by motion for determination before the hearing on the merits. The questions raised in the motions are identical.

no jurisdiction to enter judgment against it because it was not served and was not a party; that in its counterclaim Zenith recognized the separate identities of HRI and Hazeltine Corporation and sought judgment against counter-defendant HRI alone; that Hazeltine Corporation did not defend against the charge; that the stipulation, drawn by Zenith and signed by Zenith and HRI, did not justify binding the Corporation in the judgments sought; that before and during the trial Zenith indicated no construction of the stipulation as making the Corporation a party and did not move to amend the pleadings by naming the Corporation; that the findings of January 25, 1965, indicate no intention that the judgments would run against the Corporation; that it learned Zenith would seek to enforce judgment against it the day following entry of findings; and that the first suggestion in the district court of being bound came only in the proposed form of judgment submitted by Zenith on March 19, 1965.

Zenith relies upon (a) the stipulation, (b) Hazeltine's disregard of the "corporate fiction" during discovery beginning in June, 1960, by responding to subpoenas duces tecum against the Corporation without question, by submitting to deposition of the Corporation at its offices in New York with production of files of domestic and foreign patents and by the obedience of the Corporation to court orders, and (c) the dual office of plaintiff's attorney Dodds as officer of both HRI and the Corporation, certain correspondence during 1963 and "control" of the litigation by the Corporation. It relies too upon a finding of fact proposed by plaintiff:

> 8. It is stipulated that, for the purposes of this Action, Hazeltine [HRI] and H. C. may be considered a single legal entity to avoid the issue of whether or not it is appropriate to "pierce the corporate veil," but it is proper to consider the separate and unrelated activities of the two companies separately.

It further depends upon proposed findings of fact and conclusions of law favoring the Corporation. On the basis of all this, Zenith contends that Corporation is the alter ego of HRI and that the finding "piercing the corporate veil" was not clearly erroneous.

The general principle controlling this case was well stated by the Supreme Court in *Hansberry* v. *Lee*, 311 U. S. 32, 40-41 (1940):

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe . . .; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

Since Hazeltine Corporation was neither named nor served, the sole basis for liability on the judgment is the theory that HRI is its alter ego. We cannot say that the Corporation was "adequately represented" here on the alter ego issue. 311 U. S. at 42-43. The resolution of the alter ego issue can be made only after an adversary determination of the facts involved. This court cannot make an initial determination of these facts, and the district court did not do so.

The issue became apparent in the district court only after the district court had filed its findings and conclusions. And at no time during the trial did the Corporation have an opportunity to show that it was not the alter ego. The Corporation's appearance to argue the issue after the trial was not sufficient opportunity to be heard under the due process clause.

Zenith's contention that HRI adequately represented the Corporation's interests on the alter ego issue begs the question. On this issue, only the Corporation itself could have protected its own interests.

We think *Merriam* v. *Saalfield*, 241 U. S. 22 (1916), refutes Zenith's contention that control of the litigation by Hazeltine Corporation made it amenable to joinder after findings of fact and conclusions of law were adopted without service of process. In *Merriam* it was clear that Ogilvie had controlled the defense for Saalfield, the defendant named in the original suit. Here the facts are only that Dodds, attorney for plaintiff HRI, was an officer and a counsel for the Corporation. There is no showing that he was authorized to act for the Corporation. We find no basis for joining the Corporation because of its claimed participation in the trial.

The stipulation relied upon by Zenith and the district court was signed only by the "parties" to the counterclaim, and the Corporation was not a party. And there is no showing that the Corporation authorized HRI's representative to sign on its behalf.

We see no reason why the Corporation's disclosures of its files and obedience to subpoenas in connection with HRI's infringement suit should bind the Corporation as a party to a subsequent antitrust counterclaim in which it is not joined as a party.

No case cited by Zenith is applicable to the facts here. The cases cited assume there was such control of HRI as to render the latter the Corporation's agent (and in our view there is no showing of that fact on the record); and that HRI and the Corporation are the same identity, an alter ego relationship unwarranted on this record. Zenith had the burden of establishing clearly that Dodds had authority to represent the Coropration in entering the stipulation prepared by Zenith or that the Corpora-

tion was in fact the alter ego of HRI. We hold Zenith did not meet that burden.

The judgments against the Corporation are void and must be vacated.

The Patent Issues.

The HRI patent in suit, 2,547,648, (648), and Zenith's pertinent claims in issue have the purpose of automatically pertinent claims in issue have the purpose of automatically adjusting the variations in strength of signals transmitted from TV stations to receivers so as to maintain a uniform picture in the receiver. The district court denied recovery of damages for Zenith's alleged infringement on the ground that the claims in suit were invalid, that Zenith's device did not infringe and that HRI's misuse of its patent precluded it from recovery. The claims were found invalid on the alternative grounds that they defined no patentable invention over prior art and that the invention disclosed was in public use more than one year prior to October 8, 1949, when HRI "amended" its original application so as to include the claims before us.

The important question before us is whether the district court properly decided that the 1949 "amendment" was not entitled to the 1946 filing date of HRI's original application. If the district court properly decided this question, its decision of invalidity is right. We hold that the record viewed as a whole substantially supports the district court's finding that HRI was not entitled to the earlier filing date and that the claims in suit were invalid. We express no opinion upon the other issues bearing upon the infringment claim.

The record discloses that the original application was filed January 25, 1946, that RCA published a bulletin March 15, 1949, disclosing different means of achieving the purpose of the claims in HRI's original patent, and that

HRI's 1949 "amendment" discloses essentially the same means. The district court found that HRI's 1949 application sought a continuation of the original application, but that there was no basis in the original claims which justifies relating the 1949 claims to the original. These findings are challenged by HRI. The court further found that the RCA bulletin in 1949 motivated HRI's "continuation application."

In disposing of HRI's challenge of the district court's finding that there was no basis in HRI's 1946 application for allowing the 1949 claims the benefit of the 1946 filing date, we think it is necessary to briefly outline the basic principles of TV transmission and reception in order to understand the nature and function of the part of the TV receiver subject of the claims in suit.

In the transmission of a TV program to a receiving set, the camera image is rapidly scanned, as in a person's reading, by an electron beam sweeping from side to side, with each sweep progressively lower until the entire image is scanned. The intensity of the beam varies with the brightness of the point of the image being scanned. The varying electric current thus created is used to generate radio waves with corresponding intensity variations. The transmitted radio waves are received in the TV set, transformed into electric current with corresponding intensity variations, amplified, and used to vary the intensity of an electron beam scanning the TV screen, thus reproducing the image.

The beam in the TV set must scan the screen in exact synchronization with the beam in the camera. To accomplish this, synchronization pulses are included in the transmitted radio wave, representing the end of each line and the end of the field or complete picture. In the receiver, these pulses are used to govern the timing of the scanning operation.

"Sync" pulses are also used in another manner in the receiver. The intensity level of the pulses is higher

("blacker," since high intensity represents black and low intensity represent white in the signal) than the intensity level of the rest of the radio wave, and its intensity at the time of transmission is a known factor which is constant in all transmissions. The strength of a particular station's over-all signal can therefore be determined by the intensity level of the "sync" pulse. The picture tube of a TV set must receive a signal with a reasonably uniform range of intensity to perform properly. Thus, the signals of weaker or distant stations or those affected by atmospheric conditions must automatically receive more amplification than stronger signals.

The basic principle of the patent in suit, 648, involves using the intensity level of the "sync" pulses in a particular signal to generate a control voltage which in turn controls the degree of amplification needed to produce reasonable uniformity in reproducing the picture transmitted. For example, the signal of a strong nearby station will include high intensity "sync" pulses, and, through the device in suit known as an AGC circuit, these pulses will be used to generate a control voltage which in turn will automatically reduce the amount of amplification.

In the fall of 1945 when HRI began work toward perfection of its device, the basic method for adjusting the strength of signals reaching a TV receiver by the use of the "sync" pulse to produce a control voltage in an integrating load circuit was well known. This feature is used in the patent in suit and the accused device, and in other AGC devices.

In 1945, however, the AGC circuit in use was fed with current supplied from the video detector part of the receiver. This process did not produce the desired sensitivity of adjustment and although by adding a DC amplifier the desired sensitivity would be gained by increasing the voltage fed into the AGC circuit, this would require an additional stage of amplification in the receiver which was not

commercially desirable. HRI's work in 1945 was aimed at achieving the desired sensitivity of the AGC circuit by obtaining the signal voltage used in the AGC circuit from the video amplifier rather than the video detector. This would increase the voltage fed through the AGC circuit and increase the circuit's sensitivity without the necessity of an additional amplification stage. The idea was not new, but a major difficulty prevented its being applied in practice: The AGC controlled voltage had to be negative with respect to the ground, but the DC voltage level at the point in the receiver following the video amplifier was positive with respect to the ground.

HRI'S original 1946 application disclosed a means of overcoming the above problem and deriving the signal voltage from the video amplifier, for use in the AGC circuit. The video amplifier was connected in a series circuit with a diode rectifier, a source of alternating current of approximately equal voltage to that at the video amplifier and an integrating load circuit. The aim was to offset the positive polarity of the voltage at the video amplifier so that the AGC circuit would produce control voltage having the required polarity.

HRI's "continuation application" was filed October 8, 1949, and added the claims now in suit which are considerably broader than the original claims, and we think the record justifies the court's inference that the additional claims were motivated by the RCA bulletin of March 15, 1949, which disclosed a different means of deriving voltage from the video amplifier for the AGC circuit. HRI's additional claims were designed to cover the RCA disclosure. The Patent Office issued HRI's patent in suit, 648, containing the 1949 claims, on April 3, 1951.

In the 1949 RCA means and the HRI claims in suit, unlike the means disclosed in HRI's 1946 application, the video amplifier is connected to a grid controlled vacuum tube.

This tube has three types of electrode components, a cathode, an anode, and one or more grids. The grid is placed between the cathode and anode to control the flow of electricity between them. Electricity normally flows from cathode to anode when the anode has a positive voltage with respect to the cathode. If the grid is made negative with respect to the cathode it acts as a gate to control the current flowing between cathode and anode. As the grid is made more negative with respect to the cathode, the flow of electricity between cathode and anode is reduced and if the grid is made sufficiently negative the flow will be cut off.

The grid in the RCA grid control tube is connected to the video amplifier and a source of alternating current is connected with the anode, to which the alternating current supplies positive pulses. When the grid is positively charged by the video amplifier and the anode is positively charged by the alternating current, electrons will flow from the cathode to the anode and be thus fed into the AGC circuit where the required control voltage will be produced to adjust the strength of transmitted signals picked up by the receiver.

The district court had ample support for finding substantial differences between HRI's original disclosures in 1946 and the claims sought by the 1949 application. The devices clearly operate differently. Unlike the RCA device, HRI's original device provided for a series circuit connection between the video amplifier, a diode, a source of alternating current and an integrating load circuit. In HRI's original claims the alternating current, unlike RCA's, must be set at a specific level to offset positive voltage at the video amplifier. HRI's original claims utilize a diode. RCA's uses a grid control tube. HRI's original claims require offsetting positive voltage at the video amplifier, but RCA's device uses that positive voltage to control the flow of current to the integrating load circuit. The HRI

device originally claimed meets the same need as RCA's, but by entirely different means. It is significant that the HRI device originally disclosed has never been incorporated in any TV receiver sold in the United States, while RCA's device, or similar devices, have become standard features in most TV receivers.

Having found no error in the court's finding that the claims in suit constituted new matter, the conclusion of invalidity follows. The continuation, under 35 U. S. C. Sec. 120, may not be used to permit HRI to claim new material not disclosed in the original application and not invented by it so as to cut off intervening rights. The disclosures made by RCA in March, 1949, were either the property of RCA or of the public and could not be appropriated by HRI. *C & N W Railway Co.* v. *Sayles,* 97 U. S. 554 (1878); *Schriber-Schroth* v. *Cleveland Trust Co.,* 305 U. S. 47 (1939).

We need not pass on the issue of infringement.

The Misuse Issues.

Although we affirm the district court's judgment of invalidity, we must nevertheless decide the issue of patent misuse, since Zenith's counterclaim sought to recover, and had judgment for, damages as a result of HRI's alleged patent misuse.

The district court found that Zenith's five year "standard package license" (including over 500 patents) from HRI was about to expire in 1959; that Zenith rejected HRI's offer of renewal on the ground that it needed no license; that HRI then asserted infringement by Zenith of four monochrome (black and white) TV patents and offered a license under a formula providing for any one patent at a royalty rate of 50% of the package rate, for any two at 80%, and for any "three or more" at 100%, with rates based upon Zenith's total production, whether the patents

were used or not; that Zenith refused the offer, and this suit followed; and that under the circumstances, this offer was "an attempt by economic coercion to force the taking of the package."

The court found that after suit was filed HRI informed Zenith it was infringing nine color patents and again offered the package license; that Zenith again refused to accept; that in April, 1962, HRI offered to license (1) use of the nine color patents at an annual royalty rate of $435,000 or (2) use of all color patents issued and applied for at an annual rate of $500,000 or (3) the package of all monochrome and color patents at an annual rate of $150,000; and that Zenith refused.

The court further found that in March, 1963, before trial, HRI made a final offer "obviously" intended to force the package license upon the unwilling Zenith; that under this offer the options were (1) payment of $275,000 per year in royalties for use of nine color patents, (2) payment of $300,000 per year for use of all extant color patents, (3) payment of $310,000 for all extant and future color patents, or (4) payment of $200,000 for the package of all patents, color and monochrome, extant and future, at an annual maximum of $200,000; and that the only alternative to accepting one of these options was costly infringement litigation. The court found that the only practical answer to the dilemma was acceptance of the standard package under the compulsion of economic coercion.

The district court concluded that the demands upon Zenith were unlawful economic coercion which, coupled with this suit and threats of other suits, constituted an illegal attempt to force acceptance of the standard package and a misuse of patents to unlawfully extend HRI's patent monopoly, and awarded damages based on Zenith's expenses in defending this suit and in investigating other patents asserted.

We think there is substantial evidence in the record to support the findings with regard to the misuse inherent in HRI's 1962 licensing offer. Zenith's witness Crotty testified to the offers, substantially as found, from HRI representatives. HRI's president testified that Crotty could have read HRI's proposal the way Crotty had read it and admitted the offer of a package at a substantially lower rate than the "total" of the fewer than all rates. And HRI's attorney agreed with the district court that if the figures were right and if a licensee could get the package for considerably less than for nine patents an inference could be drawn that "somebody" was trying to sell a package rather than individual patents. HRI's claim of innocent mistake in drafting the offers is refuted by inter-office memos including one where patent counsel had informed his superior that the offers risked a charge of patent misuse and were apt to be viewed as "just what we intended—a transparent attempt to force them into package."

The substance of HRI's contention is that a licensor can offer to license any number of patents less than all in the package for the same total royalty, so long as that royalty is reasonable for any one of the patents and so long as he does not refuse to license individual patents. It relies upon the Supreme Court's decision in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), and this court's decision in *Hazeltine Research, Inc.* v. *Avco Mfg. Corp.*, 227 F. 2d 137 (7th Cir. 1955), *cert. denied*, 350 U. S. 987 (1956). The holding in *Automatic Radio* was that it is not *per se* misuse of a patent to measure the royalties by a percentage of the licensee's sales when the licensee is engaged in a related enterprise. The Court refused to consider the package licensing claim there, however, because there was nothing in the record to support it. 339 U. S. at 827. And in *Avco* we held that

the record did not compel a finding of coercion. Neither of those cases is in point here.

In *American Securit Co.* v. *Shatterproof Glass Corp.*, 268 F. 2d 769 (3d Cir.), *cert. denied*, 361 U. S. 902 (1959), refusal to license individual patents was held to be misuse *per se*. We see little difference between outright refusal to license less than a package and the economic coercion of HRI found, with reason, by the district court here. See Report of the Attorney General's National Committee to Study the Antitrust Laws 239-240 (1955); Diggins, The Patent-Antitrust Problem, 53 MICH. L. REV. 1093, 1105 (1955).

The district court concluded erroneously that HRI's 50% for one-80% for two-100% for three or more patents formula offered Zenith in 1959 was unlawful economic coercion. This court has not considered the formula *per se* unlawful. *Apex Electrical Mfg. Co.* v. *Altorfer Bros.*, 238 F. 2d 867 (7th Cir. 1956). Actually the formula allowed licensees to save money by taking licenses of less than three patents. Eight TV manufacturers took licenses for only one patent under the formula, the one here in suit. There were only three HRI patents in general use in 1959 and therefore the formula appears reasonable in light of commercial realities. Zenith under the offer was free to take a license only for what it needed. Although discussion of a license between Zenith and HRI originally involved four patents, the discussion narrowed to the patent in suit, Zenith's rejection of the offer, and HRI's infringement suit.

We think our conclusion affirming the trial court's determination of misuse in conjunction with the 1962 offer is strengthened by the Supreme Court's decision in *United States* v. *Loews, Inc.*, 371 U. S. 38, 54-56 (1962), where it approved the district court's injunction against economic coercion similar to that here in a case involving

refusal to "book" less than a package of films for television use.

There is no merit in HRI's contention that the misuse of its patents, including the one in suit, furnishes no basis for an award of treble damages. The requisite anti-competitive effect is presumed where the tying product is patented. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). See *United States* v. *Loew's, Inc.*, 371 U. S. 38, 45 (1962). Zenith's expenses in defending the infringement suit brought pursuant to HRI's antitrust violations are a proper subject of threefold recovery. *Dairy Foods, Inc.* v. *Dairy Maid Prod. Cooperative*, 297 F. 2d 805, 809 (7th Cir. 1961).

The district court's determination of Zenith's $50,000 basic damages for HRI's patent misuse represented, according to the findings, expenses incurred in Zenith's preparation for the 1963 trial of HRI's infringement suit and in investigating HRI patents asserted against Zenith. The $50,000 figure is not here, and as far as we are informed by HRI, was not challenged at trial. In view of HRI's unlawful conduct commencing in 1962, and the size of the record of trial of the infringement issues, we cannot say the basic damages are so unreasonable that we must set aside the allowance. We affirm the treble damage judgment of $150,000.

The Antitrust Issues.

Zenith's treble damage counterclaim was filed May 22, 1963, alleging violation by HRI of the Sherman Act, 15 U. S. C. Secs, 1 and 2, by its alleged participation in conspiracies that unlawfully prevented Zenith from exporting its United States manufactured products into Australia, Canada and England. Zenith was granted injunctive relief and treble damages on the counterclaim in the amounts of $745,380 as to the Australian market,

$18,892,173 as to the Canadian market, and $15,174,078 as to the English market. The judgment followed for $34,811.631.[3]

HRI challenges Zenith's judgment on several grounds. However, we think the crucial question is whether the district court's finding that Zenith was in fact damaged by the pools in the three countries during the four year damage period[4] preceding the filing of the counterclaim is clearly erroneous. FED. R. CIV. P. (52a). We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. We need pass on no other contention, therefore, in reversing the judgment on the counterclaim.

Zenith had the burden at the trial of showing an "injury to [its] business," 15 U. S. C. Sec. 15, by proving the unlawful conspiracies and the *fact* of damage as a proximate result of the alleged unlawful conspiratorial activities. *Story Parchment* v. *Patterson*, 282 U. S. 555; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; *Continental Ore* v. *Union Carbide*, 370 U. S. 690.

The district court concluded that the alleged conspiracies had as their express purpose prevention of importation of TV apparatus made in the United States, that HRI by participating in the conspiracies had violated the Sherman Act and that Zenith had established that it had been injured in its business as a result of the unlawful activities of the pools. The court's ultimate finding of fact was that "the foreign commerce of Zenith has been drastically curtailed by the patent pools" in the three countries. The court stated that damages had been shown by experienced Zenith officials thoroughly familiar with

3. The figures for England and Australia were reduced on December 13, 1965, upon further hearing after proofs were reopened.

4. Four years prior to the May 22, 1963, filing date of Zenith's counterclaim. 15 U. S. C. Sec. 15b.

the business problems and sales potentials in the three markets.

The ultimate finding rests upon subsidiary findings that for "many years" before 1957 Zenith tried to establish distributorships in Canada but in "every instance" the Canadian distributor was warned to stop handling Zenith products or face expensive litigation; that Zenith sought import licenses but in "every instance" such licenses were refused them; that after the 1957 settlement Zenith began late in 1958 to export to Canada its radio and TV products through Zenith Radio Corporation of Canada; but that the pool demanded that Zenith discontinue the practice and accept a standard package license and manufacture in Canada any products sold there; and that soon after the demand the instant Hazeltine infringement suit was brought.

The Zenith officials whose testimony was relied on by the court were Zenith's president, its vice-president in charge of patents, and its manager of internal auditing and chief financial officer.

A good part of the president's testimony concerned activities of the pools before the settlement of *RCA* v. *The Rauland Corporation,* No. 48 C 1818 (N. D. Ill.) in 1957. In that suit Zenith filed a treble damage counterclaim seeking damages for refusals to license similar to those alleged here, in settlement of which it obtained unrestricted cross-licenses from RCA, General Electric, and Western Electric Company, and in turn gave general releases to those three companies. The president also testified generally that after this settlement Zenith hoped to be able to compete freely in Canada with its competitors, but that unlawful pool activity continued into the damage period. His testimony was that because of the similarity between the Canadian and United States markets, he was convinced that Zenith, but for the "clouds

and difficulties'' caused by the pool's refusal of a license permitting Zenith to export to Canada, would have achieved the same percentage, 20% of the Canadian market as it enjoyed in the United States market, and would have also captured 5% of the English market and 2% of the Australian market.

Zenith's vice-president gave his opinion corroborating the statement that in a market free of license restrictions Zenith would have the percentage shares that the president testified to.

Zenith's third witness took the percentages testified to by the president and vice-president and, through the use of a chart, calculated ''lost sales and lost profits'' based on past profit and cost data.

No specific findings were made with regard to how the alleged conspiracy prevented sales by Zenith in Australia. We see no necessity of discussing at great length Zenith's failure to prove the *fact* of damage with respect to the Australian market, since there is no testimony that could reasonably support a finding of *fact* of damage there. Until April, 1960, Australian government regulations prevented Zenith's selling radio and TV sets in that country. Zenith's case rests on the testimony of its officers that conversations between Zenith employees and Australian businessmen who were not members of the patent pool led it to believe that it could not obtain a license to import radio and TV receivers into Australia after 1960. There is no evidence that Zenith ever attempted to obtain a license from the Australian pool, nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import. Indeed, during the post-1960 period a large number of low priced Japanese radio and TV sets were sold in Australia. Actually, high import duties and shipping costs posed a formidable barrier to Zenith sales. There is no evidence to warrant the inference that Zenith

intended to or was prepared to enter the Australian market. *Triangle* v. *National Elec. Prod. Co.*, 152 F. 2d 398; *Volasco Prod. Co.* v. *Fry Roofing Co.*, 309 F. 2d 383, 395.

We also conclude that Zenith failed to prove the *fact* of damage with respect to the English market. A World War II embargo prevented Zenith from importing its products into England until June, 1959. At that date all basic radio patents had expired, and Zenith had no difficulty in doing radio business in England. The difficulty Zenith had in the English market with its TV products cannot reasonably be attributed to the activity of an unlawful conspiracy in that country. Significant barriers other than patent difficulties operated to prevent sales of Zenith TV receivers in England. Zenith sets manufactured in the United States operated on 525-line and 625-line scanning signals. The English standard was a 405-line signal until changed to 625-line after the damage period. Zenith sets sold in England would be in competition with substantially lower priced British sets. There was no testimony that the British pool, during the damage period, had threatened or filed suit on any patents.

We think it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period. The only reasonable inference is that it was waiting for a change in English standards to a 625-line system. Zenith was not aided, in showing loss of probable profits, by the testimony that its man in England could adjust Zenith sets to the English standard "with a screwdriver in the back of the shop in a few minutes."

We hold that the finding of the district court that Zenith had been injured in its business by the activities of the alleged unlawful conspiracies in Australia and England is clearly erroneous.

Zenith's president's testimony with respect to the

Canadian market can be considered as some slight evidence of the *fact* of damage, being more specific than with respect to the other markets. He testified that in 1958 he complained to the Canadian pool about its advertisement in a Canadian trade journal addressed to television and radio dealers in Canada. He charged that the advertisement was false, and was damaging to Zenith's business, because it contained threats of infringement suits which were calculated to discourage distributors from handling Zenith products. This advertisement, he testified, was typical of threats made during the damage period. During his testimony, a letter, written during the damage period by a Zenith distributor in Canada with respect to threats made by the pool to a Motorola dealer, was read into the record.

Despite this testimony, the fact remains that during the damage period Zenith sold more than 65,000 radios and nearly 60,000 TV sets in Canada. It did not seek a pool license after 1953, claiming throughout the period that it had unrestricted cross-licenses as a result of the 1957 settlement which rendered pool licenses unnecessary. Zenith's president could not recall any specific threat of litigation over radios alone. Zenith's subsidiary in Canada has not been sued or threatened with suit for importing radios into Canada since 1957. There was testimony that Zenith had made no separate effort to import radios into Canada despite the fact that all basic radio patents had expired before the end of the damage period. There was no showing that the 1958 advertisement had any adverse effect on Zenith's sales.

No Canadian distributor was called as a witness by Zenith. The letter in 1962 from the Zenith dealer referring to the Motorola threat could imply that no Zenith distributor had been threatened. Although several of Zenith's United States competitors were doing business

in Canada, Zenith made no showing of comparable experience of those competitors in the United States and Canada. Zenith was advised by the pool that it was infringing pool patents in 1959, but continued to export to Canada without any interruption. In 1960 it spent 11% of its Canadian TV sales and almost 13% of its radio sales on advertising. By 1961 it had achieved 5% of the television market, and the decrease in the share thereafter was not shown to have been caused by the pool.

We hold that even though there is some testimony of damage suffered by Zenith in the damage period as a result of pool activities in Canada, we have a firm conviction that the district court made a mistake in inferring from the entire testimony that the essential element of *fact* of damage had been established by Zenith. *Milwaukee Towne Corp.* v. *Loews, Inc.*, 190 F. 2d 561, 566.

Zenith argues that HRI's instant infringement suit is in furtherance of the alleged Canadian conspiracy. There is nothing in the record to show that this suit had any effect to damage Zenith's Canadian business. The record shows that this claim was not taken seriously by the district court.

Zenith relies on this court's decision in *Dairy Foods Inc.* v. *Dairy Maid Prod.*, 297 F. 2d 805, to support its argument that the filing of the instant HRI infringement suit placed it in a dilemma since if the suit was successful it would be forced to take licenses under HRI's domestic patents, thereby losing a defense to any pool claim of infringement of patent counterparts in Canada, and that accordingly it had to curtail its operations there pending the outcome of the infringement suit. The court in *Dairy Foods* was speaking of the dilemma raised by the plaintiff's allegations which it had the burden of proving. In this case Zenith failed to prove what it alleged. As we have stated, the evidence reveals no curtailment

of Canadian operations but instead indicates extensive sales in Canada as well as heavy expenditures for advertising there. Even if we assumed the continuation of an unlawful conspiracy after the 1957 settlement, into the damage period, the assumption is of no help to Zenith, under *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725, 732, absent proof of the *fact* of damage. Nor does the statement in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F. 2d 96, 99, that the *fact* of damage need not be direct suppression of trade aid Zenith. The general language of Justice Holmes in *United States* v. *Kissel*, 218 U. S. 601, 607-08, about a continuing criminal conspiracy, does not help Zenith since even if the continuous existence of the unlawful conspiracy was, as Zenith claims, a continuous overt act, the *fact* of damage must still be shown. The facts in this case do not resemble those in *Continental Ore* v. *Union Carbide*, 370 U. S. 690, where there was clear evidence of defendant's refusal to deal with the Continental Company, as a result of which it had to drop out of the vanadium business.

We do not agree with Zenith that a Hazeltine attorney admitted at the trial that the existence of the conspiracy was a continuous overt act causing damage to Zenith. The admission was that "if the conspiracy continued" after 1957 there "might have been damage." Neither do we take as an admission to prove the *fact* of damage general statements of a Hazeltine attorney and letters long before the damage period to the effect that in "foreign countries" threats of adversely held patents are "as much of a risk to your business as are tariff restrictions, freight rates, insurance, and the many other impedimenta to the flow of trade."

In addition to oral testimony Zenith relies upon the 1957 settlement of Zenith's counterclaim in *RCA* v. *The Rauland Corp.*, No. 48 C 1818 (N. D. Ill.), to prove the

fact of damage. However, under a well settled rule, *e.g., Domark* v. *Bates Motor Co., Inc.*, 93 F. 2d 522, 526, the settlement of Zenith's suit against RCA, General Electric and Western Electric constitutes no admission of the fact of damage against Hazeltine. Even if it is true that there were damages prior to the 1957 settlement this does not prove the fact of damage between 1957 and 1963. The 1957 settlement has relevance only so far as the release of future damages given by Zenith in that settlement precludes recovery for damages resulting solely from illegal activities of the Canadian pool prior to September 27, 1957, the date of the settlement.

Zenith relies too upon a "stipulation" of Hazeltine's attorney as to the *fact* of damage to Zenith's business. The attorney stated during testimony of a Zenith official, "I am perfectly willing to stipulate that Zenith has had problems in exporting their radio and television receivers to Canada." We do not read that statement as a concession of the *fact* of damage. In context, the attorney's statement either referred to the period preceding 1957 and not to the pertinent damage period, or to other obstacles to export by Zenith such as tariffs, shipping costs, low priced competition, and technical problems.

For the reasons given, the judgment for Zenith for $34,811,631 upon the treble damage counterclaim is reversed.

The Injunction

In addition to granting treble damages to Zenith, the district court ordered injunctive relief against HRI's conduct vis-a-vis Zenith in the use of HRI's domestic patents and against its participation in unlawful antitrust conspiratorial conduct.

It follows from our conclusion with respect to the foreign patent pools that injunctive relief against "threat-

ened loss or damage" directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken.

We agree with HRI that the district court erred in holding the method of computing royalties to be patent misuse. *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950). Therefore there is no basis for that part of the court's injunction relating to payment of royalties on unpatented products, and we order that it be modified by deleting from paragraph A the words: "or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent."

We also agree with HRI that paragraph B of the injunction does not comply with the requirement of FED. R. CIV. P. 65 that it describe the acts restrained in reasonable detail. We order that it be modified so as to (1) give Zenith the benefit only of the same royalty rates as those presently in effect with other licensees, (2) permit licensing of individual patents at rates the sum of which is greater than the package rate so long as the rates for individual patents are not so disproportionate to the package rate as to amount to economic coercion to force the taking of the package, and (3) not to require that comparable royalty rates be given to Zenith for longer periods than they are available to others.

Conclusion

For the reasons given, the judgment against Hazeltine Corporation is vacated; the district court judgment holding the patent in suit invalid is affirmed; the award in favor of Zenith for treble $50,000, is affirmed; the awards for treble damages based on HRI's alleged participation in the foreign patent pool are reversed; and the cause is

remanded to the district court for the sole purpose of entering judgment in favor of Zenith and against Hazeltine Research, Inc., in the amount of $150,000, striking paragraph C of the injunction, and modifying paragraphs A and B of the injunction in a manner consistent with the view expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

A true Copy:
Teste:

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)

IN THE UNITED STATES COURT OF APPEALS.
• • (Captions—15246-7, 15563-4) • •

MOTION OF ZENITH RADIO CORPORATION FOR EXTENSION OF TIME TO FILE REHEARING PETION TO AND INCLUDING JANUARY 3, 1968.

Zenith Radio Corporation, Counter-claimant and Appellee moves this Court for an order extending the time to file a petition for rehearing to and including January 3, 1968, and for cause says:

1. On December 13, 1967 this Court filed its judgment in the above numbered appeals. The Court's opinion, however, was not filed until December 19, 1967.

2. Under Rule 25 of this Court's Rules the time for filing a petition for rehearing is fifteen (15) days from entry of judgment, or December 28, 1967.

3. Because of the delay in filing the opinion and the intervening holidays, Zenith Radio Corporation has not had sufficient time in which to determine whether to file a petition for rehearing with this Court.

Wherefore, Zenith Radio Corporation moves for the entry of an order as prayed.

Respectfully submitted,

Francis J. McConnell,
One of the attorneys for Counter-claimant and Appellee, Zenith Radio Corporation.

Of Counsel:
McConnell, Freeman, Curtis & McConnell,
134 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

UNITED STATES COURT OF APPEALS.

• • (Captions—15246-7, 15563-4) • •

Wednesday, December 27, 1967.

Before Hon. Roger J. Kiley, Circuit Judge.

On consideration of the motion and affidavit of counsel for defendant and counter-claimant-appellee, Zenith Radio Corporation,

It Is Ordered that the time for filing a petition for rehearing on behalf of Zenith Radio Corporation be extended to and including January 3, 1968.

IN THE UNITED STATES OF APPEALS.

• • (Captions—15246-7, 15563-4) • •

PETITION FOR REHEARING OR RECONSIDERATION BY THE COURT OF APPEALS EN BANC.

Zenith Radio Corporation files this petition for rehearing and because this Court's opinion has done and will do the Zenith Company tremendous injury in its effect upon its foreign business, it asks that the case may be reheard by the entire Court *en banc*, and says:

1. *This Court's holding that as a matter of law Zenith has suffered no injury from illegal patent pools is not only unsupported by the record but gives the illegal pools run by Zenith's competitors carte blanche to ruin Zenith's foreign commerce.*

In the face of the testimony of Wright and Kaplan, Zenith's president and treasurer, whose qualifications as expert witnesses were never contested (A. 1379, 1446), that in the absence of the CRPL pool Zenith would have

acquired the same percentage of the Canadian business as it enjoyed in the United States (approximately 20%), this court has held that there is no evidence in the record of the fact of damage. The testimony of Wright and Kaplan was not denied. The trial court gave it credence. It was relevant on the issue, and in the context of this record, standing without denial, was conclusive on the issue. See *Grepke* v. *General Electric Company* (7th Cir., 1960), 280 F. 2d 508, 513; *A. C. Becken Co.* v. *Gemex Corporation* (7th Cir., 1959), 272 F. 2d 1, 5; *William H. Rankin Co.* v. *Associated Bill Posters of U. S., etc.* (2nd Cir., 1930), 42 F. 2d 152, 155-6.

In *Bordonaro Bros. Theatres* v. *Paramount Pictures* (2nd Cir., 1949), 176 F. 2d 594, 597, the Court said, "The testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject matter admitted.'"

It now appears that the Wright and Kaplan testimony is corroborated by actual results in a most significant and conclusive way. An injunction against the pool's activities in Canada was entered in the court below (A. 248-9). The application of this injunction was never stayed and has been in force and effect since the entry of the final judgment in the court below (See order granting stay entered April 19, 1965). Zenith is prepared to prove that its Canadian business while afforded the protection of this injunction increased to a point representing approximately 18% of the Canadian color TV market. In 1967, under the protection of the injunction, Zenith's Canadian sales of color television sets (on which Hazeltine claims to hold the dominating patents) amounted to $12,260,000 representing an increase of over 66% as against an industry increase of approximately 21%.

The fact that Zenith sold large numbers of sets in the

face of the pool's threat to bring suits on the pool patents (A. 1332, 3263) in no way negatives the fact of damage occasioned by such threats; by the inducing of a nation-wide boycott by circularizing the trade in the "Trade Builder"; by calling attention to the pool's monopoly of patents in Canada; that Zenith sets were unlicensed and that users or dealers in unlicensed sets would be prosecuted (Def. Exs. 135-8, A. 3113, 3121). The only measure of damage available to Zenith was the difference between what it actually could sell in the restricted market and what it would have sold absent the pool. That the trial court was legally entitled to draw the inference from these proofs that Zenith had been injured in Canada is conclusively established by the decision of the Supreme Court in the case of *Bigelow* v. *R. K. O. Rado Pictures*, 327 U. S. 251, where the Supreme Court held that the fact of damage was self evident from the conspiracy which was designed and intended to prefer defendants' theatres.

In the *Bigelow* case, the Jackson Park theatre here in Chicago had large receipts from the showing of pictures, but this did not negative the fact of damage. It merely gave, as here, a credit to the defendants on the amount of the damage. That Zenith obtained 5% of the market in the face of Brian McConnell's threat to assert the pool patents has no more significance than the fact that the Jackson Park theatre made money despite being relegated to an inferior playing position by the movie conspiracy. With the aid of the injunction entered by the District Court Zenith has now built its share of the Canadian market to 18% only to find that this injunctive relief is to be removed by the order of this Court. Under this Court's decision all of this business becomes vulnerable to infringement suit on Hazeltine's Canadian monochrome and color patents and subjects Zenith and its dealers to the forfeiture and penalty provisions of the Canadian patent laws. It is

ironic that on May 23, 1967, while this case was pending before this Court, Zenith was awarded a Presidential E Certificate "For an outstanding contribution to the Export Expansion Program of the United States."

In the English and Australian markets this Court takes the anomalous position that because Zenith did not defy the pools by attempting to sell sets, it never intended to enter those markets, in spite of the uncontradicted testimony of Zenith's officers that it did so intend and the fact that Zenith had a distributor established in England (A. 1385-6) and attempted to secure distributors in Australia (A. 1398, 3767-3832-B). Parenthetically, in an effort to discredit Wright's testimony, this Court refers to reject post trial offers of proof to show that Zenith wasn't prepared to enter the English market for technical and cost reasons. The undisputed record eidence, not even mentioned in the Court's opinion, was to the contrary (A. 1452-3, 1465-6). Obviously an offer of proof is not evidence in the record, yet this Court treats such offers as established evidence even though Zenith was afforded no opportunity to produce counter evidence.

In its opinion this Court ignores completely the Canadian Royal Commission report published in December 1959 during the pendency of this litigation (Pl. Ex. 50A; 2161, 2162) and introduced into evidence by Hazeltine itself without qualification and also ignores the settlement papers introduced by Hazeltine without any qualification. The latter evidence is dismissed with the curt remark that the admissions of Hazeltine's co-conspirators, General Electric, R. C. A., and Western Electric, are not relevant evidence and not binding on Hazeltine. The statement is made in the face of the fact that the evidence was admitted and introduced by Hazeltine for all purposes in the case and under every applicable rule of evidence was binding on Hazeltine.

The fact that the members of the pool admitted they had caused Zenith damages of $10,000,000 in Canada up until October of 1957 is cavalierly dismissed as having no relevance in the instant case. In that settlement the Western Electric Company, RCA and GE paid Zenith, respectively, $2,200,000, $3,000,000 and $4,800,000. The defendants in that case were represented by leading counsel; yet this Court now holds that the pool, as a matter of law, could cause no damage to Zenith by exactly the same activity as was shown by the record in the previous case.

Zenith's total business in Canada in 1967 was approximately $20,000,000. It is that business which this Court's opinion will destroy. The illegality of the patent pools has been established repeatedly. *United States* v. *National Lead* (S. D. N. Y., 1945), 63 F. Supp. 513, 523, 527, affirmed (1947) 332 U. S. 319; *United States* v. *General Electric Co.* (N. J., 1949), 82 F. Supp. 753, 847; *United States* v. *General Electric Co.* (S. D. N. Y. 1948), 80 F. Supp. 989, 1014-5; *Timken Roller Bearing Co.* v. *United States* (1951), 341 U. S. 593, 598; *United States* v. *Imperial Chemical Industries* (S. D. N. Y., 1952), 105 F. Supp. 215, 220-3; 100 F. Supp. 504. Despite this and despite the fact that Hazeltine's co-conspirators RCA, GE, Westinghouse and Philips have been ordered out of this very Canadian patent pool (Z. A. 571, 576, 581), this Court grants Hazeltine permission to stay in the pools and to permit its patents to be used to destroy Zenith's business.

The decision of this Court that a trial court cannot as a matter of law find the fact of damage on this record beggars belief, and has created an injustice unparalled in the annals of our courts. In effect it destroys Zenith's foreign business by legally approving the activities of Zenith's competitors in preventing it access to patents which it needs to do business in foreign markets. This is done under the aegis of this Court's opinion. This decision has such

far reaching import and creates such wide exemption from the federal antitrust laws that it should be reviewed and reheard by the entire Court.

2. *Having reversed the District Court's finding on fact of damage, the Court proceeds to hold without any further discussion that, therefore, Zenith is not entitled to injunctive relief with respect to the foreign patent pools.* The opinion states:

> "It follows from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools alleged by Zenith to be unlawful conspiracies cannot be justified under 15 U. S. C. Sec. 26. Paragraph C* of the injunction granted must be stricken."

The Court's holding on this issue erroneously assumes both that Zenith had to show infringement suits by the pool during the damage period to prove injury to its business and that absent such proof Zenith is not entitled to protection by injunction from the pools. No authority is cited for this conclusion. Although the proof of injury to Zenith's export business was conclusive, Zenith would be entitled to injunctive relief even if it had shown no damage. Section 26 requires only proof of an anti-trust violation and a *threat* of future damage or injury.

Thus, in *Bedford Cut Stone* v. *Journeymen's S. C. Assoc.*, 274 U. S. 37, 54-5 (1926), a private action for injunctive relief under Section 26, the Supreme Court held:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury;

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* Paragraph C enjoins Hazeltine Corporation and HRI from "entering into, adhering to, enforcing, or claiming any rights under any contract, agreement, understanding, plan or program with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

> *but this is not material.* An intention to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears. The anti-trust Act 'directs itself against that dangerous probability as well as against the completed result'." (Emphasis added.)

Similarly, in *Vicksburg Water Works Co.* v. *Vicksburg,* 185 U. S. 65, 82, cited in the *Bedford* case, the Supreme Court held that the complainant did not have to show actual injury to be entitled to equitable relief. The Court said:

> *"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention.* It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights." (Emphasis added.)

In *Alden-Rochelle, Inc.* v. *American Soc. of C. A. & P.,* 80 F. Supp. 888, 898-9 (1948) Judge Leibell of the Southern District of New York held that Ascap had violated the anti-trust laws but that plaintiff had failed to prove that it had been injured thereby. Nonetheless, the Court granted the plaintiff's prayer for injunctive relief notwithstanding the fact that Ascap's 1947 demands for monopolistic rates had been abandoned. The Court said:

> "The August 1947 demands were abandoned by

> Ascap. Plaintiffs have been offered the same type of contract (a long term contract) that other exhibitors accepted in February 1948. Does this remove the need for injunctive relief? I have concluded that it does not. Plaintiffs are entitled to have this court exercise its equitable powers to prevent a recurrence of what happened in August 1947 and to have their rights adjudicated and protected by a decree of the court, because the unlawful arrangements between Ascap and its members, and between the members and the motion picture producers, is a continuing one and is a clear violation of the anti-trust laws."

And, in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 344, the Supreme Court said

> "All it takes to make out the cause of action for relief by injunction is *a real threat of future violation or a contemporary violation of a nature likely to continue or recur.*" (Emphasis added.)

In the instant case the District Court found that the foreign patent pools constituted illegal conspiracies in violation of the anti-trust laws. This finding was supported by overwhelming evidence and was not contested here by Hazeltine. Hazeltine is a member of the pools and the pools have exclusive licensing rights with respect to Hazeltine's foreign patents. The pool portfolios of patents include virtually all the important patents in the television field including Hazeltine's color patents. The only license the pools will grant is for local manufacture and not to import. At the same time, Hazeltine refuses to grant a license under its patents to export to foreign markets where Hazeltine is a member of the pools. The only question is whether this situation constitutes a threat to Zenith's foreign business. The District Judge so found and the evidence to support that finding was conclusive.

Thus, the Report of the Canadian Royal Commission, published during the pendency of this litigation of which

this Court's opinion makes no mention, categorically states (Pl. Ex. 50A; A. 2161, 2162):

> *"The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.*
>
> *"CRPL indicated that it does not grant a license to any importer of radio or television receivers, except in the limited situation where the type or kind of radio or television receiver sought to be imported is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.*
>
> *"It is stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . .",* (Emphasis added.)

In May, 1959 Brian McConnell, the head of CRPL, told Zenith's Vice President Crotty that Zenith was infringing pool patents, "one of which was a patent of Hazeltine origin. He told me that we would have to take a license and that the license could not be for importation, it would have to be for local manufacture." (A. 1332.) This conversation was not denied and was confirmed by McConnell's June 5 letter enclosing the pool standard license forbidding importation and notifying Zenith that reinvestigation of an imported Zenith receiver leaves "no doubt in our minds that the invention covered by the patent is used in this receiver. The tests show this quite conclusively." (Def. Ex. 154, A. 3263.)

Wright testified without contradiction that, in view of the pool policy and the threat of infringement litigation, Zenith could not develop the Canadian market in the man-

ner it would have free of the illegal pool restrictions, and that but for the pool threat Zenith would have obtained the same share of the Canadian market it did in the United States (*i.e.*, 20% instead of 5%) (A. 1412, 1374-5, 1395). This Court's opinion concedes, as it must, that Wright's testimony "with respect to the Canadian market can be considered some slight testimony of damage suffered by Zenith in the damage period as the result of pool activities in Canada."

Such evidence, as found by the District Court, clearly established "threatened loss or damage" to Zenith's foreign business. This having been established, Zenith was entitled to injunctive relief.

The effect of the Court's holding on the injunction issue is to leave Zenith's foreign business in the Canadian market (and other markets) exposed to ruinous infringement litigation and at the mercy of the pools' enforcement policy. Zenith cannot get protection by taking a license under Hazeltine's domestic patents because Hazeltine has contracted with the pools not to grant a license to export and it cannot get a license to import from the pools.

Moreover, the Court's opinion reaches the incongruous result of permitting Hazeltine to continue to be a member of foreign patent pools which admittedly violate the American anti-trust laws and to enjoy the fruits of those pools, thus in effect putting the Court's imprimatur on such illegal activity.

3. *Compounding the injustice done Zenith by its "fact of damage" and injunction ruling, the Court in its opinion sets up as the new law of this Circuit an unprecedented constitutional doctrine employing the "corporate fiction" not for the promotion of justice, but expressly to shield Hazeltine Corporation from all liability for its illegal conduct.* In doing so, the Court neither acknowledges nor

applies the controlling alter ego principles set forth by Judge Minton on behalf of this Court in *Bigelow v. RKO Pictures*, 170 F. 2d 783, 785-6, principles repeatedly enunciated by the Supreme Court. *United States* v. *Reading* (1919), 253 U. S. 41, 62-63; *Chicago M. & St. P. R. Co.* v. *Minneapolis Civic C. Assoc.* (1918), 247 U. S. 490, 501; *Louisville & N. R. Co.* v. *Schmidt* (1900), 177 U. S. 230, 237.

The Court informs an able and experienced trial judge that short of having a board resolution from HC in evidence, he had no right to believe or rely upon the solemn judicial admissions of Mr. Dodds that the plaintiff was the alter ego of, and one and the same as, Hazeltine Corporation—admissions made without qualification of any kind at the April 3, 1963 pre-trial conference, in the written stipulation that followed (A. 43, 235-6, 237-9) and in his sworn testimony at the trial. (A. 1696.) The opinion is silent as to Dodds' affidavit of May 10, 1963, in which he states (A. 41):

> "He had been retained by or employed by Plaintiff's parent Company Hazeltine Corporation, continuously since 1934 and has been a Vice President of Hazeltine Corporation continuously since 1939. (except for a period during 1944-45 when he had no connection with Hazeltine Corporation or any of its affiliates). He also was an officer of plaintiff, Hazeltine Research, Inc., from its organzation in 1946 until June 7, 1961. Since 1946, he has been continuously familiar with the patents and the patent licenses of both Plaintiff and its parent, Hazeltine Corporation."

Nor does the opinion mention Dodds' affidavit of September 12, 1963, in which he states (Z. A. 124):

> "He is now and has been for more than twenty years, trial counsel for Plaintiff and its predecessor in business and parent company, Hazeltine Corporation, and has the responsibility for conducting the trial of the instant Action."

At the trial Dodds testified (A. 1696):

> "That is correct. There is a stipulation on the record that solely for the purposes of this action plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

No one from the parent, Dodds included, denied Dodds' authority to make the stipulation during the trial. Ruestow, who was "General Patent Counsel of the Hazeltine Corporation, the parent corporation" (A. 1199-1200) and Westermann, who was "Vice President and General Counsel of Hazeltine Corporation" (A. 1493) and both of whom were present during the trial and thoroughly familiar with the stipulation, never said one single word in repudiation of the stipulation.

Despite Mr. Dodds' complete familiarity with the corporate nature and operation of the Hazeltine enterprise, this Court declares that the fictitious corporate veil supposedly separating HC and HRI must be pierced from both sides on constitutional grounds, despite the fact that the record evidence establishes these companies to be one entity.

> "Direct proof of this affirmative subserviency of the subsidiary officers is conclusive of the case against the parent corporation, insofar as the Instrumentality Rule is concerned. But such direct proof is not often forthcoming." Powell, *Parent and Subsidiary Corporations*, p. 18.

The Court's reference to *Hansberry* v. *Lee*, begs the question because even this Court concedes that if the evidence establishes (with or independently of the stipulation) that HRI is the alter ego of HC because of HC's domination and control of HRI, then HC was present as a matter of law just the same as if it had been named a formal party. *U. S.* v. *Reading Co.* (1919), 253 U. S. 41, 62-3.

This Court simply refuses to consider the evidence on

this issue, stating that the District Court did not consider it and that "This Court cannot make an initial determination of these facts." This Court, however, is bound to affirm the judgments of the District Court on any proper ground supported by the record. If the Court believes that Judge Austin relied only or primarily on the stipulation and is itself unwilling to consider the proof of alter ego in the record, it should remand the case on this issue if not satisfied that HC has had its day in court. Instead, the Court reverses outright, thereby denying *Zenith* an opportunity to be heard on this issue.

It is urgently submitted that in its opinion on the subject of the corporate fiction this Court has mistakenly applied *Hansberry* v. *Lee* with a result that does violence to time-honored principles relating to the corporate entity privilege.

> "To permit the notion of legal entity to stand in the way of a decision which justice and public policy requires, to allow a metaphysical theory and *concept* to . . . permit restraint of trade and monopoly itself to be achieved under the guise of refined and abstruse theoretical reasoning, or lack of reasoning—is abhorrent to the genius and spirit of both the common law and chancery. To the credit of our courts, it must be conceded that when tried in the balance they have not been found wanting, in this important regard." Wormser, *The Disregard of the Corporate Fiction and Allied Corporation Problems*, p. 72.

In the interest of justice any decision of this Court which so far departs from these basic principles should have the careful consideration of all of its members.

Conclusion.

By an unbelievable miscarriage of justice, this Court, by its opinion, aids and abets a conspiracy of the largest electronic companies in the world to destroy the foreign business of a Chicago company employing over twenty-five thousand persons. If ever a case deserved a hearing before this entire Court, this is the one.

We submit that such a rehearing and reargument should be permitted to prevent such an unconscionable result.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS.

Tuesday, January 23, 1968.

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

* * (Captions—15246-7, 15563-4) * *

It Is Ordered by the Court that the petition for rehearing or reconsideration by the court of appeals *en banc*, filed by Zenith Radio Corporation in the above causes, be, and the same is hereby, denied.

(Judge Fairchild voted for rehearing *en banc* "limited, however, to the issue of whether or not paragraph c should be stricken from the injunction.")

IN THE UNITED STATES COURT OF APPEALS.

* * (Captions—15246-7, 15563-4) * *

STIPULATION CONCERNING RECORD ON PETITION FOR CERTIORARI.

Counsel for Zenith Radio Corporation and counsel for Hazeltine Research, Inc. and for Hazeltine Corporation agree that the following items on the Docket of the United States Court of Appeals for the Seventh Circuit appearing in Dockets Nos. 15246, 15247, 15563 and 15564 may be excluded from the record certified to the Supreme Court of the United States:

1. Appearance of counsel, February 1, 1966.

2. Separate motions by Hazeltine Corporation and Hazeltine Research, Inc., February 18, 1966, to consolidate.

3. Response of Zenith, February 24, 1966, to Item No. 2.

4. Reply of Hazeltine Research, Inc. and Hazeltine Corporation to Item No. 3.

5. Motion, August 6, 1965, for leave to file reply brief.

6. Hazeltine Corporation's motion of August 6, 1965, for extension of time.

7. Hazeltine Research, Ins.'s motion of August 6, 1965, for extension of time.

8. Order in Docket No. 15246, August 11, 1965, extending time.

9. Order in Docket No. 15247, August 11, 1965, extending time.

10. Motion and stipulation of July 6, 1966, permitting correction of the record.

11. Motion of October 19, 1966, to clarify time.

12. Order of October 20, 1966, setting time.

13. Motion of November 16, 1966, for additional pages.

14. Order of November 17, 1966, granting Item No. 13.

15. Motion of December 8, 1966, for additional time.

16. Order of December 8, 1966, to prepare agreed order.

17. Order of December 9, 1966, extending time.

18. Motion of Zenith, January 5, 1967, to extend time and for extra pages.

19. Order of January 9, 1967, granting Item No. 18.

20. Motion of Zenith, February 17, 1967, for additional time.

21. Appellants' motion for extra oral argument, February 17, 1967.

22. Order of February 20, 1967, extending Zenith's time.

23. Zenith's answer, February 21, 1967, to motion on oral argument.

24. Zenith's motion, February 21, 1967, for extra pages.

25. Appellants' motion and reply re oral argument, February 23, 1967.

26. Order of February 23, 1967, allowing extra pages.

27. Appellants' motion of March 14, 1967, for extra pages and additional time.

28. Order of March 16, 1967, granting Item No. 27.

29. Appellants' motion of April 6, 1967, for additional time and additional pages.

30. Order of April 6, 1967, granting Item No. 29.

31. Order of April 17, 1967, setting oral argument for May 18, 1967.

32. Zenith's motion of December 26, 1967, for stay of mandate.

33. Order of December 27, 1967, staying mandate.

34. Appellants' motion of January 9, 1968, to extend time.

35. Order of January 11, 1968, extending time.

36. Zenith's motion, January 26, 1968, for stay of mandate.

37. Order of January 26, 1968, staying mandate.

It is further agreed that except for the above-described deleted items, the entire record shall be certified to the Supreme Court, including, but not by way of limitation, the following:

1. District Court Clerk's certificate of material included in the District Court record.

2. Hazeltine Corporation's Rule 15(f) motion, supporting brief and affidavit of Tiffany, July 23, 1965.

3. Zenith's answer, brief and affidavit of T. McConnell, August 3, 1965.

4. Hazeltine Corporation's reply brief and affidavit of Dodds, filed August 6, 1965.

5. Order of August 16, 1965, taking Rule 15(f) motion with the case.

6. Consolidation order of March 1, 1966.

7. Order of July 7, 1966, correcting the record on appeal.

8. Appellants' ten-volume appendix, filed October 3, 1966, and November 14, 1966.

9. Order of December 13, 1966 re motion to vacate.

10. Order of December 20, 1966, together with stipulation of December 9, 1966, correcting the record.

11. Brief of Hazeltine Research, Inc. on antitrust issues, December 21, 1966.

12. Hazeltine Research, Inc.'s brief on patent, December 21, 1966.

13. Zenith's two-volume appendix, filed February 27, 1967.

14. Order of February 27, 1967, re oral argument.

15. Zenith's brief on antitrust and misuse, March 8, 1967.

16. Zenith's answer on complete record to Rule 15(f), March 8, 1967.

17. Hazeltine Research, Inc.'s reply brief, April 18, 1967.

18. Hazeltine Research, Inc.'s misuse brief, April 18, 1967.

19. Hazeltine Corporation's Rule 15(f) reply brief, April 18, 1967.

20. Zenith's motion, May 26, 1967, for leave to file additional authority.

21. Appellants' answer of May 29, 1967, to Item No. 20.

22. Zenith's reply of May 31, 1967.

23. Order of June 6, 1967.

24. Zenith's motion of October 16, 1967, for leave to file additional authority.

25. Appellants' answer, October 17, 1967, to Item No. 24.

26. Order of Oetober 19, 1967.

27. Judgment of December 13, 1967.

28. Opinion of December 19, 1967.

29. Motion, December 27, 1967, for extension of time to file petition for rehearing.

30. Order of December 27, 1967, granting Item No. 29.

31. Zenith's petition for rehearing *en banc*.

32. Answer of Hazeltine Corporation to petition for rehearing, January 16, 1968.

33. Answer of Hazeltine Research, Inc. to petition for rehearing, January 16, 1968.

34. Order of January 23, 1968, denying rehearing and rehearing *en banc*.

35. The entire record of the District Court as transmitted to the Court of Appeals, including the supplemental record filed December 20, 1966.

36. Docket entries in Nos. 15246, 15247, 15563 and 15564.

37. This stipulation.

Dated this 6th day of March, 1968.

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ADDITIONAL DISTRICT COURT DOCKET ENTRIES DEEMED RELEVANT BY RESPONDENTS.

1/ 3/62	Filed subpoena duces tecum returned served
5/ 9/63	Filed motion (by plaintiff) to strike par. 13 of defendant's answer
5/15/63	Filed pretrial stipulation (to Judge Austin)
2/11/64	Filed Zenith's pretrial brief on the antitrust issues raised in the answer and counterclaim
2/18/64	Further evidence heard for defendant and counterclaimant and trial adjourned to 2/19/64 (Austin)
2/19/64	Further evidence heard for defendant counterclaimant. Trial adjourned to 2/20/64 (Austin)
2/20/64	Further evidence heard for counter-plaintiff. Counter-plaintiff rests. Motion of counter-defendant for judgment taken under advisement. Evidence heard for counter-defendant in part. Trial adjourned to 2/24/64 (Austin)
2/24/64	Further evidence heard for counter-defendant. Trial adjourned to 2/25/64 (Austin)
2/15/65	Filed motion of plaintiff to continue date for entry of judgment to 3/29/65 and to permit plaintiff to file prior to 3/29/65 such motions as it deems appropriate
4/ 2/65	Filed memorandum of plaintiff Hazeltine Research, Inc. concerning form of proposed final judgment and decree submitted by defendant Zenith Radio Corporation under date of April 1, 1965
5/13/65	Filed Hazeltine Research, Inc.'s offers of proof made to Judge Austin on May 31, 1965

5/18/65	Filed Zenith's statement under Rule 12(d) of the Rules of the Seventh Circuit Court of Appeals
10/18/65	Case on trial continued to 10/19/65
10/19/65	Case on trial continued to 10/20/65
11/29/65	Filed notice of motion of Zenith for entry of final judgment and amended findings of fact
12/29/65	Filed notice of Hazeltine Research, Inc. and Hazeltine Corporation and proposed second supersedeas appeal bond and draft order granting stay
12/29/65	Entered order granting stay of execution per proposed draft order and approving second supersedeas appeal bond
2/17/66	Filed and docketed record on appeal in appeals numbers 15563 and 15564
12/13/66	Entered agreed order re motion of Hazeltine Corporation to vacate December 13, 1965 judgment
12/19/67	Opinion filed